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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 105.

HAGON JOHN, GUARDIAN OF OSCAR AND ANNIE LOMAN, MINORS, PLAINTIFFS IN ERROR,

vs.

LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT COMPANY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED SEPTEMBER 28, 1911.

(22,882)

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"I am satisfied beyond any sort of doubt that the intervenor has no standing in this case, because, according to the pleadings and the facts, this man Lonan, had his restrictions removed before he sold the land to Hawk, and Hawk conveyed it to Fuller and Fuller to the plaintiff. There is no evidence to show that the plaintiff had any notice that there was anything wrong with the title, and there is no proof that he had any notice that Lonan was incapable of making business deals; there is no proof whatever of this kind and therefore I have no doubt but what the title to / Mr. Paullin is good, if there is a title in this country that is good, I think Mr. Paullin has it."

To which finding of fact the intervenor duly excepted at the time.

That the said Court erred in that part of its finding of facts and conclusions of law which is in words and figures as follows, to-wit: (see page 71 of case made.)

II

The COURT: The record shows that Thomas Lonan obtained the benefits and under these circumstances the Court does not feel justified in scrutinizing the actual money consideration as closely as he would under different circumstances, and I do not think that that consideration for that lease was so grossly inadequate as that the Court would feel justified in setting aside the lease under the circumstances in this case. It is alleged here that the Indian was incompetent, not able to look after his business, that he was easily overreached in transactions of this sort, but in my mind the party claiming under the title has a good title through the finding or holding of the Secretary of the interior, that this Indian, was competent, and that he did not derive his title from the Indian, and therefore I hold that his title is good."

To which finding of fact the intervenor duly excepted at the time.

3 III

That the said court erred in its finding of fact and conclusions of law, which is in words and figures as follows, to-wit:

"So the decree of the court will be that the intervenor take nothing on his plea of intervention."

To which finding of fact the intervenor duly excepted at the time.

That the said court erred in that part of its finding of fact and conclusions of which is words and figures as follows, to-wit: (See page 72 of case-made.)

IV

"The court finds that an application of the Secretary of the Interior, the restrictions of the said Thomas Lonan were removed and that Lonan sold the land to Hawk for a consideration, as appears in the record, of $1,500.00; that Hawk afterwards conveyed the land to Fuller for a consideration of $2,700.00, I believe, and that Fuller, afterwards conveyed the land to the plaintiff. Mr.

Paullin, for a consideration of $2,800.00. All these conveyances and the removal of the restrictions of Thomas Loman are in the record and the Court finds that Paullin bought the land from Fuller without any notice of knowledge of any defect in the title or the incompetency of the allottee and that therefore he has a good title, that the heirs of the allottee cannot attack him or his title because he is an innocent purchaser, with no knowledge of the competency or incompetency of the Indian and for the further reason that the finding of the Secretary of the Interior as to the removal of the restrictions was an adjudication that he was competent, to sell or dispose of his surplus allotment."

To which finding of fact the intervenor duly excepted at the time.

That the said Court erred in that part of its finding of fact and conclusions of law, which is in words and figures as follows, to-wit: (See page 72 of case made.)

V

"The Court finds further from the record that the consideration from Mr. Hawk to the allottee was not inadequate, or if slightly inadequate, was not so inadequate as to justify the court in setting aside the deed, and I may say that I do not consider the consideration, at that time, inadequate at all."

To which finding of fact the intervenor duly excepted at the time.

That the said Court erred in that part of its finding of fact and conclusions of Law, which is in words and figures as follows, to-wit: (See page 72 and 73 case made).

VI

"The Court further finds that the power of attorney from Thomas Loman, to Chas. H. Williams was revoked with the death of Thomas Loman, because at the time of the granting of the power of attorney Loman, could not convey any interest in the land, and for the further reason that the consideration for an int-rest in the land, even if the allot-ee could have conveyed such an interest, was grossly and entirely inadequate.

That the said court erred in that part of its finding of fact and conclusions of law, which is in words and figures as follows, to-wit: (See page 73 of case made.)

VII

"The Court: I find that the present owner of the land, Mr. Paullin is entitled to the rent due and to become due in accordance with the terms of the lease, and that he is entitled to a judgment now for $25.00 for the rent of the land for the year 1907, for which execution issue." The court finds that the intervenor shall pay the costs of the intervention, and that the plaintiff and the defendant pay the balance of the costs, each to pay one-half of the balance of the costs after the costs of the intervention have been paid."

5 To which finding of fact the intervenor duly excepted at the time.

VIII

That the court erred in that part of its decree which adjudged that the intervenor shall pay all costs of the intervention, which was excepted to at the time. See page 73 case made.

IX

That the said court erred in finding that the conveyance from Thomas Loman to Hawk was a valid conveyance, and that the subsequent conveyance from Hawk to Fuller and from Fuller to Paullin, made a perfect title in Paullin, when it was admitted in the plaintiff's petition, the defendants' answer and the Agreed Statement of Facts that Thomas Loman was a citizen by blood of the Choctaw Nation, was a full blood Choctaw Indian, illiterate, and ignorant of business transactions, and incompetent to transact such business as the sale or lease of real estate. (See Agreed Statement of Facts, paragraph 3, page 15), which was excepted to at the time.

X

That the said court erred in holding that the deed executed by Thomas Loman on the 31st day of January 1906, to S. A. Hawk, and from S. A. Hawk to E. E. Fuller, and from E. E. Fuller to Lewis Paullin, conveyed a perfect title to said Lewis Paullin, when the record shows that Chas. H. Williams was in possession at that time under a power of attorney executed by said Thomas Loman prior to the execution of said deed and that said power of attorney had not been revoked, set aside or cancelled by any act of the said Thomas Loman. And for the further reason that plaintiff in his petition or complaint nowhere asked to have said power of attorney set aside. Which was excepted to at the time. (See page 72 of case made.)

6 XI

The said court erred in not entering a decree in favor of the intervenor and against all of the defendants. Which was excepted to at the time.

XII.

The said court erred in not entering a decree that the deed from Thomas Loman was made to S. A. Hawk at a time when he was incompetent to make such a conveyance and that in as much as the defendant in error, Lewis Paullin, admitted in his complaint and in the Agreed Statement of Facts, that said Thomas Loman was an ignorant, full blood Choctaw Indian, and incapable of making a conveyance and incompetent to make a sale or lease of real estate. Which was excepted to at the time.

Wherefore the said Hagon John, Guardian aforesaid, plaintiff in error, prays that the said decree be reversed and set aside by this court.

N. B. MAXEY.

7 Endorsed: No. 202. Hagon John, Guardian, Plaintiff in Error, vs. Lewis Paullin, et al., Defendants in Error. Petition in Error, Assignment of Errors. Filed in Office of Clerk of District Court of Bryan County, Okla., May 19, 1908. W. R. Collins, Clerk of Dist. Court, by —— ——, Deputy.

8 In the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and correct copy of the original Petition in Error and Assignment of Errors, in the Case of Hagon John, Guardian, Plaintiff in Error vs. Lewis Paullin, et al., Defendants in Error, No. 202, filed in this office May 20th 1908, as the same remains on file in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said Supreme Court this April 20th 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court.
By REUEL HASKELL, JR.,
Deputy.

8½ #202.

HAGAN JOHN, Guardian, Plaintiff in Error,
vs.
LEWIS PAULLIN, Defendant in Error.

Filed In Office of Clerk of District Court, of Bryan County, Okla. 3:30 1908. W. R. Collins, Clerk of Dis't Court. —— —— Deputy.

9 In the District Court of Bryan County, Oklahoma, December Term, 1907.

No. 916.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW, INVESTMENT CO., et al., Defendant, and HAGAN JOHN, Guardian, Intervenor.

Filed May 20, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

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10 In the United States District Court for the Durant Division Cetrnl District, Indian Territory.

No. —.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW INVESTMENT CO., et als., Defendants.

Complaint in Equity.

To the Hon. Judge of the United States Court for the Central District of the Indian Territory:

Comes now Lewis Paullin, plaintiff, complaining of the Choctaw-Chickasaw Investment Co., Elmer Williams, Eli P. Williams, A. T. Banks, Tom Anderson, —— Maddox and —— Thomas, defendants and shows that the said Lewis Paullin is a citizen of the United States and resides in the Indian Territory, his Post Office address being Durant, I. T., the Choctaw-Chickasaw Investment Co., is a corporation duly incorporated under the laws of the Indian Territory, authorized to do business therein, with its principal place of business in said Territory at Ardmore, and with a branch office at Durant; that R. F. Grafa is the Agent of said Investment Co., on whom services can be procured, at Durant. That Elmer Williams and Eli P. Williams are non-residents of the Indian Territory, and live in the State of Kansas, and their Post Office address is McPherson, Kansas. That A. T. Banks, Tom Anderson, —— Maddox and —— Thomas are citizens of the United States, and reside in the Indian Territory, near Durant, and within the jurisdiction of this Court.

11 For cause of action herein the said Lewis Paullin shows that one Thos. Loman is a citizen of blood of the Choctaw nation of the Indian Territory, that as such citizen on July 21, 1903, he received from the proper authority his allotment certificate to the following described land, a copy of which is filed herewith marked Exhibit "A." The East half of the Northwest quarter and the West half of the Northwest quarter of Section Six (6) Township Seven (7) South Range Nine (9) East in the Indian Territory, and that upon the recommendation of Dana H. Kelsey U. S. Indian Agent, the restrictions of the said Thomas Loman were on the 23rd day of January, 1906 duly and legally removed, a copy of which is herewith filed and marked Exhibit "B" and that thereafter to-wit on January, 31, 1906, the said Thos. Loman joined by his wife, Lillie Loman by their warranty deed for the consideration of $1,500.00 bargained, sold and conveyed the above described land to S. A. Hawk, which deed was duly filed and recorded in the United States Clerk's Office at Durant, I. T., on February, 1, 1906, a copy of which deed is filed herewith and marked Exhibit "C" that thereafter to-wit on the 17th day of Jan., 1907, the said S. A. Hawk and

his wife Sarah E. Hawk, by warranty deed for the consideration of $2,700.00 to them in hand paid by E. E. Fuller conveyed the above described land to the said E. E. Fuller, by deed and which on the 20th day of Feb., 1907, was duly recorded in the United States Clerk's office at Durant, I. T., a copy of which deed is filed herewith and marked Exhibit "B" and thereafter to-wit on the 12th day of February 1907 the said E. E. Fuller joined by his wife Ella R. Fuller, by warranty deed, and for the consideration of $2,800, $2,300.00 of which was then paid, conveyed the said land to Lewis Paullin, plaintiff herein, which deed was on the 20th day of February 1907 duly filed and recorded in the office of the United States Clerk, at Durant, I. T. a copy of which deed is filed herewith and marked Exhibit "C."

12 That the said Lewis Paullin is the owner in fee simple of said above described land, and is entitled to the possession, use and occupancy of said land.

That on July 21st, 1903 the date upon which said land was filed upon, said Thos. Lonman made and executed a lease on said premises for a period of five years from date, to the Choctaw-Chickasaw Investment Co., for the consideration of $25.00 per annum, and on July, 1, 1904 the said Thos. Lonman executed a lease on said land for the period of five years from said date to one, Elmer Williams for the consideration of $25.00 per annum and on June, 17, 1905 the said Thos. Lonman executed a lease on said property for a term of five years from date to Eli P. Williams, the consideration therefor being $225.00 said to have been paid, and in addition the lessee agreed to pay $100.00 as follows: $25.00 on the first day of August of each year beginning with 1906. That said land consists of 100 acres less that one-half mile from the city of Durant, and about seventy-five of which is in cultivation, worth for rental purposes the sum of $2.00 an acre per annum, that all of said land now in cultivation was in cultivation when each and all of the leases were executed, that the considerations expressed in said leases are totally inadequate and fraudulent.

That the said leases to the said Choctaw-Chickasaw Investment Co., said Elmer Williams said Eli P. Williams were really and truly made to one and the same person, for the purpose of extending the leases for more than five years which would be in contravention of the law limiting leases on lands in the Indian Territory to a period of five years.

13 That in truth and in fact the said Choctaw-Chickasaw Investment Co., although a corporation is owned, officered and control-ed by the said Elmer Williams, and Eli P. Williams therefore said lease contract- are in contravention of the law limiting leases for a period of five years and further that the said R. F. Grafa of Durant, I. T. is the Agent for the said Choctaw-Chickasaw Investment Co., Elmer Williams and Eli P. Williams, and that A. T. Banks, Tom Anderson, — Maddox, and — Thomas are tenants in possession of the said above described land, that they and each of them rented said land from the said R. F. Grafa, the Agent of the said defendants as aforesaid. That by reason of the above

alleged facts the said Lewis Paullin, is entitled to the possession and use of said property. That said leases are a cloud upon the title of this plaintiff, which excludes him from the possession thereof, and diminishes the value of said premises if the said Paullin should desire to sell the same, and that said leases are setting up rights and claims under said leases antagonist- to the rights and interests of this plaintiff, to his great damage.

Wherefore he shows first that said leases should be declared null and void and that the same should be cancelled (*a*) because said leases in effect and purpose run for — period longer than five years, and are therefore void. (*b*) Because the consideration expressed in each of said leases, if in fact paid by the said lessees, are totally inadequate for land in cultivation, and within a short distance of the city of Durant, and are therefore void and fraudulent, (*c*) Because in truth and in fact said consideration as expressed in said contracts *at* paid, are insufficient and inadequate for such land, but said considerations have not been paid as-expressed in said contracts, and should therefore be declared void. That while said tenants rented said land from R. F. Grafa Agent of said lessees as above explained, they are in truth and in facts tenants of the said Lewis Pullin, and should attorn to him as their land-lord. And that said Paullin is entitled to the rents thereon for the year 1907.

Premises considered the said Lewis Paullin prays that all the defendants herein be cited as required by law to answer his complaint herein, at the next term of the Court, and that upon hearing he have judgment, declaring said leases and all of them void and that the cloud on his title created thereby be removed and that said tenant be required to pay unto said Lewis Pullin all the rents due on said premises during the year 1907, that he have all necessary orders of the Court to put him in possession of said premises, and to collect said rents. And that he have judgment for his costs in this behalf expended, for all of which he will ever pray etc.

(Signed) LEWIS PAULLIN.

UNITED STATES OF AMERICA,
Central District Indian Territory:

Lewis Paullin being duly sworn says that he is the plaintiff in the above entitled cause; that he had read the above and foregoing complaint, knows the contents thereof and that the matters and things herein stated are true and correct as he verily believes.

[SEAL.] (Signed) LEWIS PAULLIN.

Subscribed and sworn to before me this the 28th day of March, 1907.

(Signed) B. S. ATTERBACK,
Notary Public.

15 In the United States Court for the Central District of the Indian Territory, Sitting at Durant.

LEWIS PAULLIN, Plaintiff.
vs.
CHOCTAW-CHICKASAW INVESTMENT CO. et al.

Demurrer.

Come now the defendants and demur to the Complaint of the Plaintiff and for cause of Demurrer thereto, state:

1.

That said Complaint does not state facts sufficient to constitute a cause of action or entitle the Plaintiff to the relief prayed for in his Bill.

2.

A court of Equity has no jurisdiction to grant the relief prayed for, the reason that it is a Bill to remove a cloud from plaintiff's title and the Bill shows upon its face that the Plaintiff is not in possession of the land sued for but on the contrary shows that the defendants are in possession.

3.

The complaint shows on its face that the Plaintiff has Complete and adequate — at law.

4.

The complaint attempts to raise the question of the adequacy of the consideration mentioned in the leases to defendants, which is a question that could only be raised by the original lessor.

Wherefore, defendants pray the judgment of the Court.

(Signed) RAYMOND, MAXEY & RUNYAN,
CROOK & KYLE.

Attorneys for Defts.

16 In the United States — America, Central District, Durant Division Indian Territory.

In the United States District Court, said District.

#916.

LEWIS PAULLIN, Plaintiff.
vs.
CHOCTAW-CHICKASAW INV. CO. et als., Defendants.

Original Answer to Defendant to Amended Complaint in Equity.

Now comes Eli P. Williams one of the Defendants, in the above styled and numbered cause, and after his general and special demur-

rers to Plaintiff's complaint have been *been* by the court overruled, and answering herein avers and says.—That it is true as alleged in plaintiff's complaint, that the said Thos. Loman did on the 17th day of June 1905, lease to this Defendant the premises in controversy, and that he is now in the possession of said premises by reason of said contract and lease, through his tenants Banks, Anderson, Maddox, and he specifically denies that *any* fraud, collusion or undue influence was used with this grantor or any one else in the execution of said lease contracts, and the delivery of possession of said land to this Defendant.

Further answering this Defendant avers and says, that the Plaintiff herein is not entitled to the possession of said premises by reason of the alleged purchase set up in his complaint, for he had knowledge that said premises had been delivered to this defendant by virtue of said lease contract and said plaintiff purchased with full knowledge of such conditions, and his purchase price of the said premises was gauged by such knowledge, and *and* by the said condition of said premises.

This Defendant further denies all and singular, all the other several allegations in Plaintiff's complaint contained, and demands strict proof of same.

——— ———.
——— ———.

17 In the United States Court for the Durant Division of the Central District, Indian Territory, at Durant.

Equity. No. 916.

LEWIS PAULLIN, Plaintiff.
vs.
CHOCTAW-CHICKASAW INVESTMENT CO. et als., Defendants.

Now comes Eli P. Williams, one of the defendants in the above entitled and numbered cause, and amending his original answer filed herein on the — day of ——— 1907, and so amending the said defendants' demurrer having been heretofore by the Court overruled, says, that it is true, as alleged in plaintiff's complaint that the land in controversy herein was on June 17th, 1905, by the said Thos. Loman leased to this defendant for a term of Five Years from said date and that said defendant by virtue of said lease so executed and delivered to him, is in possession of said land.

This defendant denies that the said lease so made to him as aforesaid, was at the same time leased to the Choctaw-Chickasaw Investment Company and said Elmer Williams and said Eli P. Williams are one and the same persons.

Said defendant denies that he took advantage of the ignorance, if any, of the said Thos. Loman, and want of education, if any, and want of knowledge of the English Language, if any, and denies that he took any advantage of the enfeebled mental condition, if any, of the said Thomas Loman, in the procurement and execution to him aforesaid of the said lease.

18 This defendant denies that any duress, fraud, false representations, artifice or deceit was used by him to induce said Thomas Loman to execute the said lease for the consideration therein mentioned.

This defendant denies that the said tenants aforesaid, are the tenants of the said Lewis Paullin, but are the tenants of this defendant.

This defendant denies that the said Plaintiff is entitled to the rents for the year 1907, or any other year during the life of the said lease.

Wherefore having fully answered the defendant prays that the plaintiff take nothing by this suit, and that he be quieted in the possession of said land during the life of his said lease and that he have judgment for his costs expended herein and for such other relief as he may be entitled by reason of the premises.

(Signed) CROOK & KLYE,
Attorneys for Eli P. Williams.

19 In the United States Court for the Durant Division, Central District, Indian Territory.

No. —.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW INV. CO. et als., Defendants.

Amended Complaint in Equity.

To the Hon. Thos. G. Humphry, Judge of Said Court:

Comes now Lewis Paullin, Plaintiff and for his amended complaint complains of the Choctaw-Chicas*haw* Investment Co., Elmer Williams, Eli P. Williams, A. T. Banks, Tom Anderson, — Maddox and — Thomas, defendants, and shows that the said Lewis Paullin is a citizen of the United States, and resides in the Indian Territory, his post office address being Durant, I. T.; That the Choctaw-Chicas*haw* Investment Co., is a corporation duly incorporated under the laws of the Indian Territory, authorized to do business therein, with its principle places of business in said Territory at Ardmore, and with a branch office at Durant; that R. F. Grafa is the Agent of said Investment Co., on whom service can be produced at Durant. That Elmer Williams and Eli P. Williams are nonresidents of the Indian Territory, and live in the State of Kansas, and their post office address is McPherson, Kansas. That A. T. Banks, Tom Anderson, — Maddox and — Thomas are citizens of the United States and reside in the Indian Territory, near Durant, and within the Jurisdiction of the Court.

20 For cause of action herein the said Lewis Paullin shows that one Thos. Loman is a citizen by blood of the Choctaw Nation of the Indian Territory, that as such citizen on July 21st, 1903, he received from the proper authority has allotment certificate

to the following described land, a copy of which is filed herewith marked Exhibit "A." The East half of the north west quarter and the west half of the North west quarter of Section six (6) Township seven (7) South Range (9) east in the Indian Territory, and that upon the recommendation of Dana H. Kelsey, U. S. Indian Agent, the restrictions of the said Thos. Loman were on the 23rd day of January, 1906 duly and legally removed, a copy of which is herewith filed and marked exhibit "B," and that thereafter to-wit on January, 31st, 1906, the said Thos. Loman joined by his wife Lille Loman by their warranty deed for the consideration of $1,500 bargained, sold and conveyed the above described land to S. A. Hawk, which deed was duly filed and recorded in the United States Clerk's Office at Durant, I. T., on February, 1, 1906, a copy of which deed is filed herewith and marked "Exhibit "C" that hereafter to-wit on the 17th day of January, 1907, the said S. A. Hawk and his wife Sara E. Hawk by warranty deed and for the consideration of $2,700.00 to them in hand paid by E. E. Fuller, conveying the above described land to the said E. E. Fuller, by deed, and which on the 20th day of February, 1907, was duly recorded in the United States Clerk's Office at Durant, I. T., a copy of which Deed is filed herewith and marked Exhibit "D" and thereafter to-wit on the 12th day of February, 1907, the said E. E. Fuller joined by his wife Ella R. Fuller, by warranty deed, and for the consideration of $2,800.00 $2,300.00 of which was then paid, conveyed the said land to Lewis Paullin, plaintiff herein, which deed was on the 20th day of February, 1907, duly filed
21 and recorded in the office of the United States Clerk at Durant, I. T., a copy of which deed is filed herewith and marked "Exhibit "C" That the said Lewis Paullin is the owner in fee simple of said above described land, and is entitled to the possession, use and occupancy of said land.

That on July 21, 1903, the date upon which said land was filed upon, said Thos. Loman made and executed a lease on said premises for a period of five years from date, to the Choctaw-Chickasaw Investment Co., for the consideration of $25.00 per annum, and on July, 1st, 1904, the said Thos. Loman executed a lease on said land for the period of five years from said date to one, Elmer Williams for the consideration of $25.00 per annum and on June, 17th, 1905 the said Thos. Loman executed a lease on said property for a term of five years from date to Eli P. Williams, the consideration thereof being $225.00 said to have been paid and in addition the lessee agreed to pay $100 as follows: $25.00 on the First day of August of each year beginning with 1906. That the said land consists of 100 acres less than one half mile from the city of Durant, and about seventy-five *fo* which is in cultivation, worth for rental purposes the sum of $2.00 an acre per annum, that all of said land now in cultivation was in cultivation when each and all of the leases were executed, that the consideration expressed in said leases are totally inadequate, and fraudulent.

That the said lease to the said Choctaw-Chickasaw Invest-
22 ment Co., said Elmer Williams said Eli P. Williams were really and truly made to one and the same person, for the

purpose of extending the leases for more than five years, which would be in controvention of the law limiting leases on lands in the Indian Territory to a period of five years.

That in truth and in fact the said Choctaw-Chickasaw Investment Co., although a corporation is owned, officered and controled by the said Elmer Williams, and Eli P. Williams, therefore said lease contracts are in contravention of the law limiting leases for a period of five years, and further that the said R. F. Grafa of Durant I. T., is the Agent for the said Choctaw-Chickasaw Investment Co. Elmer Williams, Eli P. Williams, and A. T. Banks, Tom Anderson, ——— Maddox, and ——— Thomas are tenants in possession of the said above described land, that they and each of them rent said land from the said R. F. Grafa, the Agent of the said defendants as aforesaid. That by reason of the above alleged facts the said Lewis Paullin, is entitled to the possession and use of said property. That sais lessees are a cloud upon the title of this plaintiff, which excludes him from the possession thereof, and diminishes the value of said premises if the said Paullin should desire to sell the same, and that said lessees are setting up rights and claims under said leases antagonist- to the rights and interests of this plaintiff, to his great damage.

23 Further complaining complainant states that said Thos. Loman was a full blood Indian; that he was totally without education being unable to speak or write the English Language; that he was weak minded, ignorant and easily influenced; that the defendants Eli P. Williams and Elmer Williams well knew these facts and took advantage of the ignorance and want of education and also want of knowledge of the English Language, and of his enfeebled mental condition in the procurement of the leases above mentioned in this complaint; that they induced said Thos. Loman to executed the said leases when he had no knowledge of what he was doing nor of the nature and character of the instrument which he was signing; that the said Eli P. Williams and said Elmer Williams by duress and by fraud and by false representations, by artifice and deceit induced said *said* Thos. Loman to accept for the leases a total inadequate consideration and but for the practice of the said duress, undue influence and fraud he would not have executed and signed said leases nor have been content with the consideration provided for and expressed in the instrument of lease.

Further complaining complainant states that the exercise of the above acts of duress, undue influence, fraud and deceit together with the inadequate consideration provided for in the instrument of lease constituted a fraud upon the said Thos. Loman.

Plaintiff further complains state- that the lease herein before mentioned, to-wit: the lease to Eli P. Williams had in it a section relating to coal and gas, and that the other did not and for this reason same was and is void, never having been approved by the Secreta- of the interior as required by Law.

24 Wherefore complainant shows that said leases should be declared null and void, and that the same should be cancelled. (*a*) because in effect and purpose they run for a

term longer than five years, and are therefore void. (*b*) because the consideration expressed in each of said leases, if in fact paid by the said lessees are totally inadequate for land in cultivation, and are therefore fraudulent and void (*c*) because in truth and in fact said consideration as expressed in said contract, if paid, are insufficient and inadequate for such land, but said considerations have not been paid as expressed in said lease contracts and for this reason the same should be declared void. (*d*) because said lease contracts were obtained from said Thos. Loman by the said Eli P. Williams and said Elmer Williams, by the practice of duress undue influence fraud and deceit for those reasons the same should be declared void.

That while said tenants rented said land from R. F. Grafa Agent of said lessees as above explained, they are in truth and in fact tenants of the said Lewis Paullin, and should attorn to him as their land-lord. And that said Paullin is entitled to the rents thereof for the year, 1907.

Premises considered the said Lewis Paullin prays that all defendants herein be cited as required by law to answer his complaint herein, at the next term of the Court, and that upon hearing, he have judgment, declaring said leases and all of them void and that the cloud on his title created thereby be removed and that said tenants be required to pay unto said Lewis Paullin all the rents due on said premises during the year 1907, that he have all necessary orders of the Court to put him in possession of said premises, and to collect said rents and that he have judgment for his costs in this behalf expended, for all of which he will ever pray etc.

(Signed) LEWIS PAULLIN,
Plaintiff.

25 In the United States Court for the Durant Division, Central District, Indian Territory.

Filed May 20, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy.

LEWIS PAULLIN, Plaintiff.
vs.
CHOCTAW-CHICASAW INVESTMENT CO. et als., Defendants.

To the Hon. D. A. Richardson, Special Master:

Comes now Crockett & Hayes attorneys of record for Plaintiff, and Crook & Kyle attorneys of record for the deefndant Eli P. Williams, and C. C. Parker attorney for non-resident defendants Chas. H. Williams and Elmer Williams, and agree that the following facts are true in said cause for all purposes of said trial but the admissability of the same in testimony before the said Master is subject to any and all legal objections.

That the allegations in said petition with reference to the residence and place of business of the plaintiff and each of the defendants is true and that all of the defendants in said cause have been

legally served and that this Court has jurisdiction of said parties and said cause of action.

That Thomas Loman is a citizen by blood of the Choctaw Nation, was a full blood Choctaw Indian, illiterate, and ignorant of business transactions and incompetant to transact such business as the sale or lease of real estate. That as such citizen of July, 21, 1903, he received from the proper authority his allotment certificate to the following described lands: E 2 of N. W 4 and the W 2 of the N. W 4 of the N. E 4 of Section 6 T. 7 S., R. 9 E in the Indian Territory, that on said July 21, 1903 the date upon which said allotment certificate was issued said Thomas Loman made and executed the lease on said premises for a period of five years from date to
26 the Choctaw-Chickasaw Investment Co., the consideration therefor being $25.00 per annum; that one year thereafter to-wit, July, 1, 1904, the said Thomas Loman executed lease on said land for the period of five years from said date to one Elmer Williams for the consideration of $25.00 per annum and that on June 17, 1905 the said Thomas Loman executed a lease on said property for a term of five years from date to Eli P. Williams the consideration therefor being $225.00, said to have been paid and in addition the lessee agreed to pay $100.00 as follows, $25.00 on the 1st day of August beginning with 1906; that on same date to-wit June, 17, 1905 Thomas Loman made and executed to Chas. H. Williams an instrument conveying said land, the consideration therefor being $1.00 appointing him the said Chas H. Williams his Agent and attorney in fact, empowering him to do any and all acts at any and all times that said Loman could do for himself in the management sale and renting, etc. of said land, and in the same conveyance for the sum of $1.00 the said Loman agreed to convey and transfer said Agent and attorney an interest in said land for the period of fifteen years or to the first of January, 1920.

Third. That Eli P. Williams at the time of the making of said leases was Secretary of the Choctaw-Cyickasaw Investment Co., and signed said leases as such Secretary; that said Elmer Williams and Chas. H. Williams are sons of said Eli P. Williams are interested in each and all of said leases. And that Eli. P. Williams was a witness to the signature of Thomas Loman to lease to Elmer Williams.

Fourth. That said Chas. H. Williams has rented this land,
27 collected all the rents therefore, paid what little has been paid for said leases and the other have never paid a cent thereon nor collected any revenue therefrom.

Fifth. That it is the custom of the said Choctaw-Chickasaw Investment Co., the said Eli P. Williams, Elmer Williams and Chas. H. Williams in their real estate dealing in the Central District of the Indian Territory to take similar instruments as these covering this land and that the same — invariably made to the same parties to whom the said Thomas Loman has executed conveyances on the land in controversy.

Sixth. That R. F. Grafa of Durant, Indian Territory is the Agent of the said Choctaw-Chickasaw Investment Co., is also the agent

of Eli P. Williams, Elmer Williams and Chas. H. Williams, and has done the renting and looking after the said Loman tract of land in the capacity of Agent for all of said parties and no one else has sought to exercise any control over same during the life of said leases.

Seventh. That said land consists of 100 acres within two miles of the city of Durant, about seventy acres of which is in cultivation, and the same being in cultivation at the time the first of said leases was executed; that said land for each and every year since 1903 was reasonable worth the sum of $2.00 per acre as rental.

Eighth. That A. T. Banks, Tom Anderson, —— Maddox and —— Thomas are the tenants now in the actual possession and cultivating the said land.

Signed this the 14th day of October, 1907.

(Signed) CROCKETT & HAYES,
Attorneys for Plaintiff.
CROOK & KYLE,
Attorneys for Eli P. Williams.
CHAS. C. PARKER,
Attorney for Elmer & Chas. H. Williams.

28 In the District Court of Bryan County, Oklahoma, December Term, 1907.

No. 916.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW INVESTMENT CO. et al., Defendants.

Comes now the defendants in the above entitled and numbered cause, and for amended answer herein denies all and singular, each and every allegation in plaintiff's petition contained, except such as is in this answer admitted.

Defendants admit that the said Thomas Loman is a citizen by blood of the Choctaw Nation, and that as such citizen on July 21, 1903 he received an allotment certificate for the following described land, to-wit:—

E. ½ of N. W. ¼ and the N. W. ¼ of the N. W. ¼ of the N. E. ¼ of Sec. 6 Twp. 7 S. R. 9 East, in the Indian Territory.

And that on June 17, 1905 the said Thomas Loman, executed the lease on said land for a term of five years from said date to Eli P. Williams, and that said Thomas Loman, was a full blood Indian, that he was totally without education, that he was unable to speak or write the English Language, that he was weak minded, that he was ignorant and easily influenced, and incompetent to transact such business as the sale of real estate.

Defendant alleges and says that the said land so sold and conveyed to S. A. Hawk for the consideration of $1,500.00 as alleged, was fraudulent and void, for the reason that the grantor therein was incompetent to sell, transfer, and convey the said real estate,

and that the said price of $1,500,00 was grossly inadequate and said deed and conveyance was procured by the said S. A. Hawk, fraudulently, taking advantage of the ignorance and want of education and want of knowledge of the English Language of the grantor the said Thomas Loman, and fraudulently took advantage
29 of the enfeebled mental condition of the said Thomas Loman and induced the said Thomas Loman, to execute said deed and conveyance when he had no knowledge of what he was doing nor the nature and character of the act, nor the nature and character of the instrument he was signing.

Defendant specially alleges and says that the reasonable market value of the said land at the time of the execution of the deed and conveyance from the said Thomas Loman to the said S. A. Hawk, was the sum of $5,000.00, and that in truth and in fact, the said S. A. Hawk, paid no such sum, to said Thomas Loman, as $1,500.00 for the purchase price thereof as alleged in plaintiff's petition, but that in truth and in fact, the said S. A. Hawk, paid the said Thomas Loman, if anything the sum of $ 50.00 or some such small sum as that, as the purchase price of said land, and that said deed of conveyance so made to the said S. A. Hawk, by the said Thomas Loman, for these reasons are fraudulent and void, and conveyed no title to the said land.

That the pretended Title so obtained as aforesaid by the said S. A. Hawk from the said Thomas Loman, was in turn conveyed to E. E. Fuller, who in turn conveyed the same to L. Paullin, the plaintiff and that all of said conveyances were void and of no force and effect.

Defendant specially alleges and says that he assisted said Thomas Loman in alloting said described land, and that he paid all the expenses incident to said acts of allotment including hotel bills, railroad fare to and from the — and for his benefit in such incidental expenses the sum of $30.00.

30 That at the special instance and request of the said Thomas Loman, and for his special benefit, and in order to obtain the very best class of land for him; defendant furnished the said Thomas Loman with the further sum of $300.00 in cash to purchase the improvements upon said allotment, and for the possession thereof and the right to allot same to the said Thomas Loman.

That said Thomas Loman was a very poor man without and funds or means whereby he was able to pay necessary expenses of allot-ing and was unable without such help to pay for the improvements upon said allotment.

That in order to repay said advances and said loans it was mutually agreed that said sums so advanced by the said defendant to the said Loman should be a part of the consideration of said lease, and that said defendant has in fact paid, or caused to be paid to the said Thomas Loman, in addition to above amounts $25.00 per year, as stipulated in said lease contract, up to the time of his death.

That the leases executed by the said Thomas Loman to the Choctaw Chickasaw Investment Co. and to Elmer Williams were, by mutual consent of the parties thereto, cancelled and abrogated

prior to the execution of the lease from the said Thomas Loman, to the said Elie P. Williams.

That A. T. Banks, Tom Anderson —— Maddox and —— Thomas are tenants of Charles H. Williams, under and by virtue of a power of attorney executed to the said Charles H. Williams, by the said Thomas Loman, a copy of which is hereto attached, marked exhibit "A" and made a part of this answer, and that the said Charles H. Williams has been in possession of said land by virtue of said power of attorney and by the consent of the said Eli P. Williams, since the date of execution of said power of Attorney.

31 That the sale of the said land by the said Thomas Loman, to the said S. A. Hawk, and through him to the plaintiff herein, if not void for grossly inadequacy of price, incompetency to convey is never the less still void for the reason that the said Thomas Loman has no legal power to make a deed of conveyance after he had executed said power of Attorney, to Charles H. Williams.

That defendant A. T. Banks, Tom Anderson —— Maddox and —— Thomas as such tenants aforesaid adopt the answer herein filed by their Co-defendants.

Premises considered, defendants pray that the above described land deeds of conveyance made by the said Thomas Loman, to the said S. A. Hawk, and from the said Hawk to the said Fuller, and from the said Fuller to the said Paullin, plaintiff to above described land, be cancelled and that plaintiff take nothing by this suit, and that the defendants be adjudged to have peaceable possession of said land. That they have judgment for their costs and for all other relief both legal and equitable, that they may be entitled to by reason of the premises.

COOK & KYLE,
Att'ys for Def'ts.

32 *Power of Attorney.*

Know all men by these presents that, I, Thomas Loman for and in consideration of the sum of $1.00 to me in hand paid, the receipt of same is hereby acknowledged, have on this day appointed, and do by these presents appoint, constitute and nominate Charles H. Williams, my sole and only, true and lawful agent and attorney in fact with full power to lease, rent, sell and convey, in whole or in part and receive the rents and considerations for such sales and conveyances, the lands heretofore filed on by me as my allotment E. ½ of N. W. ¼ and W. ½ of N. W. ¼ of N. E. ¼ of section 6 in Township 7 South Range 9 East of the Indian Territory.

My agent and attorney in fact named herein is hereby authorized and empowered to do any and all acts at any time, that I could lawfully do myself relative to the renting leasing selling, conveying, controlling and managing said lands, and I hereby ratify and confirm all the acts of my agent and attorney in fact relating to said lands, and for a further and additional consideration of the sum of $1 paid to me on this date and other valuable good and sufficient considerations, the receipt of same is hereby acknowledged, I hereby

sell, convey and transfer to said agent and attorney in fact named herein an interest in all the above lands and the rents thereof and agree that this power of attorney is coupled with an interest in said lands and the rents thereof, and I further agree in consideration of the pay-ent mentioned above that this power of attorney shall not revoked by me, by heirs executors or administrators before the first day of January, A. D., 1920.

33 All other powers of attorney and agencies are hereby revoked and cancelled and the party named herein is my sole and only authorized and acting agent and attorney in fact.

Dated this 17 day of June, 1905.

His
THOMAS x LOMAN
mark.

Witness to mark:
W. E. FORBES.
GEO. T. VICTOR.

UNITED STATES OF AMERICA,
Indian Territory, Central District, ss:

On this 17 day of June, A. D. 1905, personally appeared before me a Notary Public of the above named District Thomas Loman to me personally well known as the person named in the foregoing instrument and acknowledged that he subscribed and executed the same for the consideration and purposes therein mentioned and set forth as his free, voluntary act and deed.

And I do hereby so certify.

Witness my hand and seal as such Notary Public the year and day last above mentioned.

T. G. CARR,
Notary Public.

My Commission expires Sept. 8, 1908.

Exhibit "A".

34 In the United States Court for the Durant Division of Central District Indian Territory, at Durant.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW INVESTMENT CO., et al., Defendants.

Comes now Hagon John, and represents to the Court that he is the legally appointed guardian of Oscar Loman and Anna Loman, who are the sole heirs at law of Thomas Loman the allottee of the land in controversy, the above entitled cause.

That the conveyances through which the plaintiff, Lewis Paullin claims title, are fraudulent and void for the reason that the said Thomas Loman was a full-blooded Choctaw Indian, illiterate and ignorant of business transactions and wholly incompetent to transact such business as the sale of real estate; and that the conveyances

from Thomas Loman to S. A. Hawk, which is the basis of plaintiff's alleged title, was procured by fraud and undue influence and should be set aside, and all subsequent conveyances thereafter of said land, including the conveyance to the plaintiff Lewis Paullin.

Wherefore your petitioner prays that he be allowed as guardian of said minors, to intervene in the above entitled cause, and set up the right of said minors to said land, and have the same determined in this suit, to the end that the title of said minors shall not be further complicated or clouded.

(Signed) HAGON JOHN, *Guardian*,
By N. B. MAXEY,
His Attorney.

35 Record District Court of Bryan County, State of Oklahoma, December Term, 1907.

WEDNESDAY, *Jan.* 8, 1908.

Court met pursuant to adjournment present and presiding the Honorable M. E. Rosser, District Judge. Whereupon the following proceedings were had to-wit:

December Term, 1907.

916.

WEDNESDAY *Jan.* 9, 1908.

LEWIS PAULLIN,
vs.
CHOCTAW-CHICKASAW INVESTMENT CO., et al.

Now on this day comes on for hearing the motion of Hagon John, g'd'n of — minors, to be allowed to intervene in this cause and the Court being well and fully advised in the premises doth grant said motion to which action of this court plaintiff excepted.

Whereupon comes Hagon John and files intervening petition.

Whereupon Court was adjourned until to-morrow morning.

MALCOLM E. ROSSER,
District Judge.

Filed May 20 1908. W. H. L. Campbell, Clerk of the Supreme Court. By ——, Deputy.

36 In the United States Court for the Durant Division of the Central District, Indian Territory, at Durant.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW INVESTMENT COMPANY et al., Defendants.

Comes now Hagon John, the duly appointed and acting guardian of Oscar Loman and Anna Loman, minors and by leave of Court

first had and obtained presents this, his petition of intervention in the above entitled cause, and for cause of action against both plaintiff and defendant says:

That the land in controversy in this suit was the allotment of one Thomas Loman, a citizen by blood of the Choctaw Nation, and set apart to him on July, 21, 1903, by the Commission to the Five Civilized Tribes and is described as follows:

The West 19.60 acres of Lot Two (2) and the Lot numbered Three (3) and the Southeast quarter of the Northwest quarter of Section Six (6) Township Seven (7) South Range Nine (9) East, in the Choctaw Nation Indian Territory.

That said Thomas Loman died on the 17th day of June, 1905, leaving him surviving Oscar Loman and Anna Loman, his children and sole heirs at law.

Your petitioner further states that prior to the death of the said Thomas Loman he executed the leases and deeds described in plaintiff's complaint but that at the time of the execution of the same he was wholly incompetent to understand the nature of the business which he was transacting and that the same was procured by the parties thereto by fraud, misrepresentation and undue influence over him.

37 Your petitioner further represents that the said Thomas Loman was a full-blood Choctaw Indian without any education and unable to speak or write the English Language; that he was weak minded, ignorant and easily influenced and that the parties procuring said leases and deeds well knew these facts and took advantage of the ignorance, want of education and want of knowledge of the English Language and his enfeebled mental condition in the procurement of the said leases and said deeds mentioned in plaintiff's complaint, and that while said leases and deeds recite a valuable consideration there was, in fact no such amounts paid, and the amounts that were actually paid were wholly inadequate consideration for the land described therein.

Your petitioner further represents that long prior to the death of the said Thomas Loman he was wholly incapacitated from transacting any business on account of his ignorance old age and enfeebled condition, and that both the plaintiff and defendant and the persons from whom they claim to have derived title were all fully advised of his condition and knew the said conveyances were made by him when he did — have mental capacity enough to know what he was doing, and are therefore void and of no effect.

Your petitioner further states that he is informed and believes that while the deed from said Thomas Loman to S. A. Hawk recited a consideration of Fifteen Hundred Dollars that in truth and in fact no such consideration was paid but only a very small amount, the exact amount being to your petitioner unknown, and that the considerations mentioned in the deeds from Hawk to Fuller and from Fuller to Lewis Paullin, the plaintiff were not the true considerations paid.

38 Your petitioner further states that he is informed and believes, and so states the facts to be, that S. A. Hawk E. E.

Fuller and Lewis Paullin, the plaintiff herein, conspired together for the purpose of defrauding the said Thomas Loman out of said land and that they procured, by fraud and misrepresentation the removal of the restrictions on the sale of said land, by the United States Indian Agent and Secretary of Interior, and that at the time said restrictions were removed that the said Thomas Loman did not know what was being done and had no conception of the transaction whatever, and that the said United States Indian Agent and Secretary of the Interior were deceived and misled as to the true condition of the mind of said Thomas Loman at the time said restrictions were removed, and that in fact said Thomas Loman never appeared before said United States Indian Agent but only before a subordinate of said Indian Agent and was not examined by him nor anyone else connected with the Interior Department but that said subordinate took only the evidence of said Hawk and such persons as he produced as witnesses, and that if said Indian Agent and Secretary of the Interior had been fully advised as to the condition of the said Thomas Loman they would have refused to remove the restrictions on the sale of said land.

Your petitioner therefore avers that the removal of the restrictions by said officers of the Interior Department, as well as the execution of the deeds and leases mentioned in plaintiff's complaint, were procured by fraud, deceit and misrepresentation, and should not prejudice the right of these intervenors.

39 The premises considered, your petitioner prays that the leases executed by said Thomas Loman to the defendants, Choctaw-Chickasaw Investment Co., Elmer Williams and Eli P. Williams, and the deeds executed by the said Thomas Loman to S. A. Hawk and by S. A. Hawk to E. E. Fuller and by E. E. Fuller to Lewis Paullin, the plaintiff, be cancelled, set aside and held for naught, as a cloud on these petitioners' title and that such other and further orders be made in the premises as will fully protect the rights of these intervenors.

(Signed)

N. B. MAXEY.
Attorney for Intervenors.
and Hagon John, G'd'n.

40 In the District Court of Bryan County, Oklahoma, at Durant.

No. —.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW INVESTMENT CO. et als., Defendants.

It is admitted by the plaintiff in the case that W. E. Forbes was present on June, 17th 1905 when Thomas Loman executed the lease to Eli P. Williams and Power of Attorney to Charles H. Williams and W. E. Forbes explained the lease and power of attorney

to Thomas Lonan in the Choctaw Language, and said W. E. Forbes witnesses the execution of both said instruments.

(Signed) CROCKETT & HAYES.
Attorneys for Plaintiff.

11 In District Court Bryan County, Oklahoma, December Term, 1907.

LEWIS PAULLIN, Plaintiff.
vs.
CHOCTAW-CHICKASAW INVESTMENT CO., et al., Defendant.

The Deposition of Thomas G. Carr Taken on the 23rd. Day of December, 1907, Between the Hours of Eight O'clock a. m. and Six O'clock p. m., at the Office of Jno. C. Earl in the City of Garvin in the County of McCurtain of the State of Oklahoma, to Be Read as Evidence in an Action Between Lewis Paullin, Plaintiff, and Choctaw-Chickasaw Investment Co. et al., Defendant, Pending in the Bryan County District Court.

12 My name is Thomas G. Carr, Post Office Garvin Oklahoma, age 28. On January, 31st 1907 I took the acknowledgment of Thomas Lonan and his wife Lillie Lonan to a deed to S. A. Hawk from the conversation between the parties at that time I understood that Thomas Lonan had been paid One Hundred Dollars and the amount paid at that time, in check and notes, to the best of my recollection was Five Hundred and fifty dollars making a total consideration for the deed to the best of my recollection of six hundred and fifty dollars.

All of the foregoing testimony is objected to by the complaints herein on the grounds first that the witness does not undertake to state positively the facts stated but he testifies for the most part from memory;

Second. That most of the testimony given by the said witness is hearsay.

Third. That all of the said testimony is incompetent, irrelevant and immaterial.

Fourth. That *on* part of the said testimony has any bearing upon the issues involved in the suit filed by Lewis Paullin, Plaintiff versus Eli P. Williams, defendant, the object of said suit being to cancel/ certain leases executed by the said Thomas Lonan to Eli P. Williams and others nor upon any issues likely to be or can be involved in said case.

The parties to whom I refered were Thomas Lonan and S. A. Hawk. I am not positive that Hawk was there but if he was not there said conversation was between Thomas Lonan and the party who paid the consideration for Hawk and to whom said deed was delivered.

(Signed) THOMAS CARR.

43 THE STATE OF OKLAHOMA.
County of McCurtain:

I, John C. Earle A Notary Public within and for McCurtain County, do certify that the foregoing deposition of Thomas G. Carr was taken before me, and was read to and subscribed by him in my presence at the time and place in the action mentioned in the caption, the said Thomas G. Carr having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth and nothing but the truth, and that his statements were reduced to writing by me in his presence, the plaintiff and defendant both being present, by their attorneys, at the examination.

Given under my hand this 23rd day of December, 1907.

JOHN C. EARL,
Notary Public.

My commission expires Dec. 12-1910.

Filed May 20 1908. W. H. L. Campbell, Clerk of the Supreme Court, by ——— ———, Deputy.

44 In the District Court of Bryan County, Oklahoma.

No. 916.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW INVESTMENT CO. et als., Defendants.

Now on this, the 11th., day of January, the same being a regular court day of the December, 1907 term of this court, the above numbered and entitled cause came on for hearing, all the parties appearing by counsel, and announcing ready.

Intervenor moved the Court to strike from the record the last section of Plaintiff's reply filed in this cause, as follows:

"Plaintiff further says that Hagon John is not prosecuting this suit, but that the same is done by the defendant Williams, that Williams had him appointed guardian of the said minors and employed N. B. Maxey to press said suit and brought said Hogon John here, paid his expenses, and that the said John never saw Maxey until this morning when he came into this court."

The court sustained the motion and the cause in the answer, as stated above, was ordered stricken from the record.

Plaintiff demanded a jury in the cause, and there being no objection on the part of the defendant or the intervenor, a jury of twelve good and lawful men was legally sworn and empaneled.

Intervenor asked leave of the Court to withdraw his plea of intervention.

45 Leave to withdraw granted by the Court and Plaintiff excepted to the action of the court in granting such leave for the intervenor to withdraw his plea of intervention.

Plaintiff waived the jury, and there being no objection on the part of the defendant the jury was discharged from consideration of the cause.

Intervenor asked leave to be reinstated in the cause, to withdraw his motion asking that his plea of intervention be withdrawn and to take his chances of trial in this cause.

The Court granted the motion to reinstate Intervenor, to which action of the Court plaintiff then and there in open Court excepted.

Plaintiff asked leave to amend his pleadings by interlineation, to show that one of the leases as shown in Plaintiff's complaint had in it a section relating to a coal and gas, and that the others did not, that same had not been approved by the Secretary of the Interior and was therefore null and void.

Leave to amend was granted by the Court, to which action of the Court defendant and intervenor then and there in open court excepted.

Plaintiff introduced, abstract, and it was admitted by counsel for all parties that they might start at the common foundation, the allotment certificate to Thos. Loman and that the land described therein is the land in controversy in this case, and it is admitted that the patent was issued to the said Thos. Loman.

The abstract as introduced is as follows:

46 Sheet No. —.

Certificate No. 1991.

W. W. P. 158.

Allotment Certificate.

Department of the Interior.

Commission to the Five Civilized Tribes.

Roll Choctaw by Blood No. 3380.

In the matter of the allotment of the lands of the Choctaws and Chickasaws.

CHOCTAW LAND OFFICE, *July* 21*st*, 1903.

Citizens by Blood and Intermarriage.

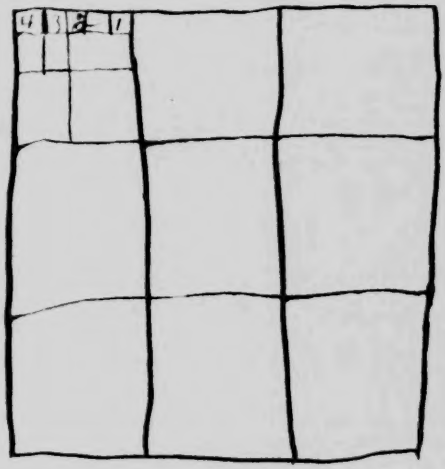
This Certifi*cies* that Thomas Loman has this day been allotted the following described land, exclusive of a homestead, viz:

Subdivision	Sec.	Town.	Range	Acres	100
W. 19.60 a. of Lot 2	6	7S	9E	19	60
Lot 3.	6	7S	9E	39	46
The Southeast quarter of the Northwest quarter,	6	7S	9E	40	....

of the Indian base and meridian, containing 99.06 acres, more or less, as the case may be, according to the United States survey thereof.

Total appraised value of the lands described in this certificate: $495.30.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
TAMS BIXBY, *Chairman.*



CHOCTAW NATION.

This certificate is not transferable.

Filed for record in the office of the U. S. Clerk and recorded at Durant, I. T. March 10th, 1906, and Recorded in Book 18 Page 28.

47 Book —, Page —.

Allotment Patent No. 2526. Choctaw Roll No. 3380.

Date of Certificate July 21st, 1903.

The Choctaw and Chickasaw Nations, Indian Territory.

To all to Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat. 641), and ratified by the citizens of the Choctaw and Chickasaw Nations, September 25, 1902, it was provided that there should be alloted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and

Whereas, It was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment,

designate, or have selected and designated for him, from his allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Thomas Loman a citizen of the Choctaw Nation as an allotment exclusive of land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nations selected as a homestead as aforesaid-

48 Now, Therefore, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1908 (30 Stat. 495), have granted and conveyed, and by these presents do grant and convey unto the said (Same name as above) Thos. Loman all right, title, and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described land, viz.

The west 19.60 acres of Lot Two (2) and Lot numbered Three (3) and the Southeast quarter of the Northwest quarter of Section Six (6) Township Seven (7) South Range Nine (9) east of the Indian Base and Meridian, in Indian Territory, containing 99.06 acres, more or less, as the case may be, according to the United survey thereof, subject, however, to the provisions of the Act of Congress approved July 1, 1902 (32 Stat., 641).

In Witness Whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Date Nov. 22nd, 1904.

(Seal, Choctaw Nation.)

GREEN McCURTAIN,
Principal Chief of the Choctaw Nation.

Date December 9th, 1904.

(Seal, Chicasaw Nation.)

DOUGLAS H. JOHNSTON,
Governor of the Chickasaw Nation.

DEPARTMENT OF THE INTERIOR.

Approved Sept. 8th, 1905.

THOMAS RYAN,
Acting Secretary.
By OLIVER A. PHELPS, *Clerk.*

Filed for record in office of the commission to the commission to the Five Civilized Tribes at Muskogee, I. T. Sept. 18th, 1905, and recorded in Book 3, Page 290.

49 *Lease, Dated July 21st, 1903, and Filed for in the Office of the office of the United States Clerk and Recorded at Durant, I. T. August 31st, 1903, at 10:40 a. m. and Recorded in Book 2, Page 65.*

Thomas Loman, Choctaw Citizen, to Choctaw-Chickasaw Investment Co.

Rent for five years from this date. Consideration $25.00 per annum.

Conveys, The East one half of the Northwest one fourth and the West one half of the Northwest one fourth of the North east one fourth of Section 6, Township 7, South Range 9 East.

His
THOMAS *hxs* LOMAN.
mark.
CHOCTAW-CHICKASAW INV. CO.,
By ELI P. WILLIAMS, *Sec'y.*

Witness to mark:
W. F. PITZER.
LONIE CHOATE.

UNITED STATES OF AMERICA,
Indian Territory, Judicial District, ss:

On this 21st day of July 1903, personally appeared before me, a Notary Public of the above named district, Thomas Loman, to me personally well known as the person named in the foregoing instrument as the grantor, and acknowledged that he had subscribed and executed the same for the consideration and purposes therein set forth as his free, voluntary act and deed.

Witness my hand and seal as such Notary Public the year and day last above mentioned.

E. A. NEWMAN.
Notary Public.

50 *Lease Dated July 1st, 1904, and Filed for Record in the Office of the United States Clerk and Recorded at Durant, I. T., August 12th, 1904, and Recorded in Book 7, Page 39.*

Thomas Loman to Elmer Williams.

Lessor leases to the lessee the premises for 5 years from date. Conveys the East half of the Northwest quarter and the West half of the Northwest quarter of the Northeast quarter of Section six (6) Township Seven (7) South Range Nine (9) East.

It is hereby agreed that the lessee has the option to clear, break out and put in cultivation all or any part of said land and the cost of same shall be considered so much additional rent paid for the use of said land.

It is agreed that the lessee will not assign all or any part of rents without the written consent of the lessee.

Lessor agrees to give immediate possession. Lessee may use tim without further charge.

This lease covers all gas and coal and on said land and le agrees to pay 8% of oil, customary price for gas and 8 cents per for coal mined or produced on said land.

Acknowledged July 1st, 1904 before G. A. Spaulding Uni States Commissioner Central District of Indian Territory.

51 *Lease Dated June 17th, 1905, and Filed for Record in Office of the United States Clerk and Recorded at Dura I. T., August 16th, 1905, and Recorded in Book 14, P* 212.

Thomas Loman to Eli P. Williams.

Lease for a term of 5 years. Consideration $225 paid and addition lessee agrees to pay $100.00 as follows, $25.00 on the day of August of each year beginning with 1906. Conveys the E half of the Northwest quarter and the West half of the Northw quarter of the Northeast quarter of Section Six (6) Townsh Seven (7) South Range Nine (9) East.

It is agreed that the Lessee has the option to clear, break out an put in cultivation all or any part of said land and the cost of sa shall be considered as so much additional rent paid for the use said land.

It is agreed that the lessor will not assign all or any part of t rents without the written consent of the lessee.

Lessor agrees to give immediate possession. Lessee may u timber without further charge.

This lease covers oil and gas and coal on said land and less agrees to pay 8% for oil, customary price for gas and 8 cents pe ton of coal mined or produced on said land.

Acknowledged before T. G. Garr, Notary Public Central Distri of the Indian Territory Commission expires Sept. 8th, 1908. Sea

52 It was agreed that the original power of Attorney, instea of the Power of Attorney contained in the abstract shoul be used the power of attorney in the abstract containing the wor "repled" instead of the word "revoked." The Power of Attorne is as follows:

Power of Attorney.

Know all men by these presents that, I, Thomas Loman for and in consideration of the sum of $1.00 to me in hand paid, the receip of which is hereby acknowledged, have on this day appointed, and by these presents appoint, constisute and nominate Charles H. Wil liams my sole and only, true and lawful agent and attorney in fact with full power to lease, sell and convey, in whole or in part, and

receive the rents and considerations for such sales and conveyances, the lands heretofore filed on by me as my allotment, E. ½ of N. W. ¼ and W. ½ of N. W. ¼ of N. E. ¼ of Section 6 in Township 7 South Range 9 East in the Indian Territory.

My agent and attorney in fact named herein is hereby authorized and empowered to do any and all acts at any time, that I could lawfully do my self relative to the renting, leasing, selling, conveying, controlling and managing said lands, and I hereby ratify and confirm all the acts of my agent and attorney in fact relative to said lands, and for a further and additional consideration of the sum of $4.00 00 paid to me on this date, and other valuable good and sufficient considerations, the receipt of same is hereby acknowledged, I hereby sell, convey and transfer to said agent and attorney in fact named herein an interest in all the above lands and the rents thereof and agree that this power of attorney is coupled with an interest in said lands and the rents thereof, and I further agree in consideration of the payment mentioned above that this power of atorney shall not be revoked by me, my heirs, executors or administrators before the first day of January A. D. 1920.

53 All other powers of attorney and agencies are hereby revoked and cancelled and the party named herein is my sole and only authorized and acting agent and attorney in fact.

Dated this 17th day of June, 1905.

His
THOMAS x LOWMAN.
mark.

Witness to mark:

W. E. FORBES.
GEO. T. L. VICTER.

UNITED STATES OF AMERICA.
Indian Territory, Central Judicial District, ss:

On this 17th day of June, A. D. 1905 personally appeared before me, a Notary Public of the above named District, Thomas Lowman to me personally well known to be the person named in the foregoing instrument and acknowledged that he subscribed and executed the same for the consideration and purposes therein mentioned and set forth as his free, voluntary act and deed. And I do Hereby so certify.

Witness my hand and seal as such Notary Public the year and day last above mentioned.

[SEAL.]

T. G. GARR,
Notary Public.

54 *Warranty Deed, Dated December* 13, 1905, *and Filed for Record in the Office of the United States Clerk and Recorded at Durant, I. T., December* 16, 1905, *and Recorded in Book* 15, *Page* 248.

Thomas Lowman and Lilly Loman, His Wife, to S. A. Hawk.

Grant, Bargain, sell, convey and confirm. Consideration $100.00 Conveys, The West one half of Northwest quarter of Northeast quarter of Section Six, (6) Township 7, South Range 9 East. The same being less than one fourth of my allotment share of lands other then homestead, and containing 20 acres, together with all improvements thereon, and appurtenances thereto belonging or in any wise appertaining thereto, and warrant the title to the same. To have and to hold the said lands unto the said party of the second part, his heirs, executors, administrators and assigns forever.

This covenance is executed in compliance with section 16 of the Supplemental treaty, approved July 1st, 1902, and provides that one fourth of all lands of an allottee, other than their homestead, may be sold within one year from date of patent.

And I, Lilly Loman, wife of Thomas Loman, the grantor herein do hereby join in the convenance, and for the consideration aforesaid convey and renounce all right of homestead in and to said property; and for the said consideration hereby release and relinquish unto the said S. A. Hawk, his heirs and assigns, all right, claim and possibility of dower in and to the said property.

55 We further covenant that said lands are free from incumbrance and lease, except leas[t] to E. P. Williams.

His
THOMAS x LOMAN. [SEAL.]
mark.

Her
LILLY x LOMAN. [SEAL.]
mark.

Witness to mark:
W. E. BECKER.
C. W. JAMES.
DAISY LEFLORE.

UNITED STATES OF AMERICA,
Central District, Indian Territory, ss:

Be it remembered that on this day came before me, the undersigned Notary Public duly commissioned and acting as such Thomas Loman and Lilly Loman to me personally well known as the parties grantor in the within and foregoing deed of conveyance and stated that they had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby certify.

An[f] I further certify that on this day also voluntar[y]ily appeared before me, the said Lilly Loman, wife of the said Thomas Loman,

to me personally well known to be the person whose name appears upon the within and foregoing, and in the absence of her said husband, declared that she had of her own free will executed said deed and signed and sealed the relinquishment of dower and homestead therein expressed for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have this the 13th, day of December 1905 set my hand and affix- my seal of office at Garvin, Indian Territory.

A. E. BECKER,
Notary Public, Central District, Indian Territory.

My commission expires May 16, 1908.

56 *Removal of Restrictions, Dated Dec. 29th, 1905, and Filed for Record in the Office of the Commission to the Five Civilized Tribes at Muskogee, Ind. Ter., Feb. 9, 1906, and Recorded in Book 3, Page 529, and in the Office of the Clerk and Recorder at Durant, March 10, 1906, and Recorded in Book 18, Page 29.*

Number 2000. Roll No. 3380.

In the Matter of the Application of THOMAS LOMAN, a Citizen by Blood of the Choctaw Nation, for the Removal of the Restrictions upon the Sale of His Allotment, Except His Homestead.

In accordance with the regulations approved by the Secretary of the Interior, May 12, 1904, in conformity to the provisions of the Act of Congress approved April 21, 1904 (33 Stats., 204), I have made a full investigation in connection with the application of Thomas Loman, a citizen by blood of the Choctaw Nation, for the removal of the restrictions upon the alienation of his allotment (except his homestead), and am, as the result of that investigation, satisfied that the removal of restrictions upon the alienation of * * * allotted lands, except as to * * * homestead will be for the best interests of the allottee, and I so recommend. The approval of this certificate does not in any manner determine the right of the allottee to any particular tract of land.

DANA H. KELSEY,
United States Indian Agent.

Department of the Interior, Washington, D. C., Jan. 23, 1906, 190-.

Approved:

THOS. RYAN,
Secretary of the Interior, First Asst.

57 *Warranty Deed, Dated January, 31st, 1906, and Filed for Record in the Office of the United States Clerk and Recorder at Durant, I. T., February, 1st, 1906, and Recorded in Book 15, Page 475.*

Thomas Loman and Lilly Loman, Husband and Wife, to S. A. Hawk.

Grant, bargain Sell & Convey and confirm. Consideration $1,500.00 Conveys the east — of the Northwest quarter and the West half of the Northwest quarter of the Northeast quarter of Section Six (6) Township Seven (7) South Range Nine East. The same being the allotment of Thomas Loman other than the homestead and the restrictions of the same having been removed by the secretary of the Interior, together with all the improvements thereon, and the appurtenances thereto belonging or in any wise appertaining thereto, and warrant the title to the same.

To have and to hold the same land unto the said party of the second part his heair executors administrators and assigns forever. And we hereby convenant that we have the right to sell the lands allotted as aforesaid, and in the event of said allotment being cancelled, that conveyance shall inclose any and all o lands selected in lieu thereof, the same as if specially described herein.

And I Lilly Loman wife of Thomas Loman the grantor herein, do hereby join in the convenance and for the consideration in aforesaid convey and renounce all right of Homestead in and to said property; and for the said consideration do hereby release and relinquish unto the said S. A. Hawk his heirs and assigns, all right claim or possibility of Dower to the said property.

58 We further covenant that the lands are free of incumbrance and leases except —

His
THOMAS x LOMAN
mark. [SEAL.]
Her
LILLIE x LOMAN
mark.

Witness to marks of Thomas and Lillie Loman:

T. G. CARR.
A. E. BECKER.
ANNIE MITCHELL.

UNITED STATES OF AMERICA,
Indian Territory, Central District:

Be it remembered that on this day came before me the undersigned a Notary Public duly commissioned and acting Thomas Loman to me personally well known as the party grantor in the within and foregoing deed of conveyance and stated that he had executed

the same for the consideration and purposes therein mentioned and set forth and I do hereby so certify.

And I further certify that on this day also voluntary appeared before me the said Lilly Loman wife of the said Thomas Loman to me personally well known to be the person whose name appears upon the within and foregoing and in the absence of her husband declared that she had of her own free will executed said deed and signed and sealed the relinquishment of Dower and Homestead therein expressed for the consideration and purposes therein contained and set forth without compulsion or undue influence of her said husband.

In testimony whereof I have this 31st day of January, 1906 set my hand and affixed my seal of office at Garvin, Indian Territory.

T. G. CARR,
Notary Public, Central District, Ind. Ter.

My Commission expires Sept. 8th, 1908.

59 *Quit Claim Deed, Dated Feb. 13th, 1906, and Filed for Record in the Office of the United States Clerk and Record at Durant, I. T., March. 27th, 1906, at 8 a. m., and Recorded in Book 18, Page 97.*

S. A. Hawk and Sara E. Hawk, His Wife, to Frank Sabourin.

Remise Release and Forever Quit Title Consideration $300.00. Conveys the East Half of the Northwest quarter of section Six (6) Township Seven (7) South Range Nine (9) East.

To have and to hold the same with all the rights immunities privileges and appurtenances thereunto belonging, unto the said party of the second part his assigns forever.

And I Sarah E. Hawk wife of the said S. A. Hawk for the Consideration uses and purposes above set out, do hereby release and relinquish unto said second party his heirs and assigns all my right to dower in and to said land and tenements.

S. A. HAWK. [SEAL.]
SARAH E. HAWK. [SEAL.]

INDIAN TERRITORY,
Central District, Indian Territory:

On this 13th day of February, 1906 appeared in person before me, a Notary Public in and for the District and Territory aforesaid S. A. Hawk and Sarah E. Hawk his wife to me well known as the persons who signed the above and foregoing instrument as the party grantor and acknowledged that they executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

60 And I further certify that on the same day voluntarily appeared in person before me the said Sarah E. Hawk wife of the said S. A. Hawk to me well known as such and in the absence of her said husband acknowledged that she had executed the said in-

strument and signed and sealed the relinquishment of dower and Homestead therein contained of her own free will for the consideration and purposes and uses therein mentioned and set forth without compulsion or undue influence of her said husband.

[SEAL.] A. E. BECKER,
Notary Public.

My Commission expires May 15th 1908.

61 *Quit Claim Deed, Dated March* 17, 1906, *and Filed for Record in the Office of the United States Clerk and Recorder at Durant I. T., July* 16, 1908, *and Recorded in Book* 19, *Page* 17.

Frank C. Sabourin to S. A. Hawk.

Denise Release sell convey and Quit Claim Consideration $1,500.00 Conveys the East Half of the North west quarter of Section Six (6) Township Seven (7) South Range Nine East.

To have and to hold the same together with all the singular and appurtenanced and privile*d*ges thereunto belonging or appertaining and all the estate right title interes- and claim whatever of the said party of the first part in law or equity to the only proper use benefit and behoof of the part of the second part h— heirs and assigns forever.

FRANK SABOURIN.

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District.

On this 17 day of March 1906 personally appeared before me a Notary Public within and for the above named District, Frank C. Sabourin a single man to me personally well known to be the person named in the foregoing instrument as the Grantor and acknowledged that he had subscribed and executed the same for the consideration and *proposes* therein set forth as his free voluntary act and deed.

Witness my hand and seal as such Notary Public on this 17 day of March 1906.

[SEAL.] E. C. BOTHWELL,
Notary Public.

My Commission expires Jan. 2, 1910.

62 Interpleader objected to the introduction of the page of the abstract showing the removal of the restrictions of Thomas Loman, on the ground that same was incompetent, irrelevant and immaterial and does not tend to prove or disprove any issue in the cause and for the further reason that it is admitted *by* the plaintiff, both in his amended petition and in the agreed statement of facts that Thomas Loman was incompetent to make a contract and was therefore estopped by that admission. The objection was overruled, to which *ruling* of the Court, Intervenor then and there in open Court excepted.

Plaintiff introduced in evidence deed from S. A. Hawk and wife to E. E. Fuller, as follows:

General Warranty Deed.

This Indenture made and entered into this 31st day of January, one thousand nine hundred and six by and between Thomas Loman and Lilly Loman, husband and wife, parties of the first part, and S. A. Hawk of South McAlester, I. T., party of the second part.

Witnesseth that the said parties of the first part for and in consideration of the sum of Fifteen Hundred (1,500.00) Dollars in hand paid the receipt of which is hereby acknowledged, do hereby grant, bargain, sell convey and confirm unto said party of the second part the following described real estate and premises situate in the Choctaw Nation, and within the limits of the Indian Territory, to-wit. The east one half (E. 1/2) of the north west one fourth (N. W. 1/4) and the west one half (W. 1/2) of the northwest one fourth (N. W. 1/4) of the north east one fourth (N. E. 1/4) of section six (6) in township seven (7) south and range nine (9) east, the same being the allotment of Thomas Loman, other than the homestead and the restrictions upon the sale of the same having been removed by the Secretary of Interior.

Together with all the improvements thereon, and appur-
63 tenances thereunto belonging or in any wise appertaining thereunto *belonging or in any wise appertaining thereto*, and warrant the title to the same.

To have and to hold the said lands unto the said party of the second part, his heirs, executors, administrators and assigns forever, and we hereby covenant that we have the right to sell the lands allotted as aforesaid, and in the event of said allotment being cancelled from any cause that conveyance shall include any and all lands selected in lieu thereof, the same as if specially described herein.

And I, Lilly Loman wife of Thomas Loman, the grantor herein, do hereby join the conveyance and for the consideration aforesaid convey and renounce all right of homestead in and to said property, and for the said consideration do hereby release and relinquish unto the said S. A. Hawk his heirs and assigns all right claim and possibility of dower in and to said property.

We further covenant that said lands are free of incumbrances and leases except —.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

His
THOMAS x LOMAN. [SEAL.]
mark
Her
LILLY x LOMAN. [SEAL.]
mark

Witness of marks of Thomas Loman and Lilly Loman:
T. G. CARR.
A. E. BECKNER.
ANNIE MITCHELL.

UNITED STATES OF AMERICA,
Indian Territory, Central District:

64 Be it remembered, that on this day came before me, the undersigned Notary Public duly commissioned and acting as such Thomas Loman, to me personally well known as the party grantor in the within and foregoing deed of conveyance and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby certify.

And I further certify that on this day also voluntarily appeared before me, the said Lilly Loman, wife of the said Thomas Loman to me personally well known to be the person whose name appears upon the within and foregoing, and in the absence of her said husband, declared that she had of her *own* free will executed said deed and signed and sealed the relinquishment of dower and homestead therein expressed for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof I have this 31 day of January, 1906, set my hand and affixed my seal of office at Garvin, Indian Territory.

[SEAL.]

T. G. CARR,
Notary Public, Central District, Indian Territory.

My Commission expires Sept. 3, 1908.

Filed for record in my office this 1 day of February, 1906 at 8 o'clock A. M.

W. B. STONE,
Deputy U. S. Clerk and Ex-Officio Recorder.

Record 15, Page 475.

65 UNITED STATES OF AMERICA,
Indian Territory, Central District, ss:

Know all men by these presents: That S. A. Hawk joined by his wife, Sarah E. Hawk for and in consideration of the sum of twenty seven hundred ($2,700.00) Dollars cash in hand paid, the receipt of which is hereby acknowledged from the hereinafter named grantee, hereby bargain, sell and convey, and by these presents have bargained granted, sold and conveyed unto E. E. Fuller the following described lands and premises, located and situated within the Choctaw Nation, Indian Territory, and particularly described as follows, to-wit:

The east half (1/2) of the north West quarter (1/4) and the west half (1/2) of the north west quarter (1/4) of the north east quarter (1/4) all in section six (6) Township seven (7) south, range nine (9) east of the Indian base and Meridian.

To have and to hold the same, together with all privileges, rights, improvements and appurtenanced thereto pertaining or belonging, unto the said grantee, his heirs, executors, administrators and assigns in fee simple forever the said S. A. Hawk hereby covena-ting that at

the delivery hereof he is seized of the lands and premises, that he has a good and legal right to sell and convey the same, and that they are free and clear of incumbrances of any nature whatever, and that he will and his heirs, executors, administrators and assigns shall ever warrant and defend the title to said premises unto the said E. E. Fuller, his heirs, executors, administrators and assigns, against the lawful claim and demand of any and all persons whomsoever.

66 And Mrs. Sarah E. Hawk, wife of the said S. A. Hawk, for and in consideration of the sum of one dollar and divers other good and valuable consideration receipt of which is hereby acknowledged from the herein grantee, hereby releases, relinquishes, quit claims, sets over and conveys unto the said E. E. Fuller, his heirs, executors administrators and assigns all right or possible right of dower that she may now or hereafter have in and to the premises herein described in fee simple forever.

In witness whereof we have hereunto set our hands and seals on this the 17th day of January, A. D. 1907.

S. A. HAWK.
SARAH E. HAWK.

UNITED STATES OF AMERICA,
Indian Territory, Central District:

On this 17th day of January, 1907 personally appeared before me Kent V. Gay a Notary Public within and for the Central District of the Indian Territory, S. A. Hawk to me personally well known to be the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated and acknowledged to me that he executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

67 And I further certify that on this day voluntarily appeared before me, Sarah E. Hawk, to me well known as such, and in the absence of her said husband, acknowledged and declared that she had executed the said deed, and signed and sealed the relinquishment of dower therein expressed of her own free will, for the consideration and purposes therein mentioned and set forth without compulsion or undue influence on the part of her said husband.

In witness whereof I have hereunto set my hand and affixed my official seal on the day and date last above written.

[SEAL.]

KENT V. GAY,
Notary Public.

My Commission expires June, 27, 1909.

Filed for record in my office this 20 day of February, 1907 at 1 o'clock A. M.

W. B. STONE,
Deputy U. S. Clerk and Ex-Officio
Recorder.
Record 21, Page 652.

68 *Deed from E. E. Fuller and Wife to Lewis Paullin.*

UNITED STATES OF AMERICA,
Indian Territory, Central District:

Know all men by these presents that I, E. E. Fuller, joined by my wife Ella R. Fuller, for and in consideration of the sum of Twenty eight hundred ($2,800.00) Dollars, the receipt of which is hereby acknowledged from the hereinafter named grantee, hereby grant, gargain, sell and convey, and by these presents have granted, bargained, sold and conveyed unto Lewis Paullin the following described land and premises located and situated within the central District of the Indian Territory, to-wit:

The east ½ of the northwest quarter, and the west half of the northwest quarter on north east quarter of section six (6) township seven (7) south, range nine (9) east of the Indian Base and Meridian.

To have and to hold the said land together with all improvements and appurtenances thereunto belonging or pertaining unto the said Lewis Paullin, his heirs, executors, administrators and assigns in fee simple forever.

And the herein grantor hereby covenants that at the delivery hereof he is lawfully seized and possessed of an indefeasible estate of inheritance in fee simple in and to the lands and premises herein conveyed, that he has a good and legal right to sell and convey the sale; that the same is clear and free of any and all encumbrances, and to that end he binds himself, his heirs, executors, administrators, assigns forever to defend the same unto the herein grantee against the lawful claims and demands of all persons whomsoever claiming or to claim the same.

69 And Mrs. Ella R. Fuller, wife of the said E. E. Fuller for and in consideration of the sum of one dollar and divers other good and valuable considerations, the receipt of which is hereby acknowledged from the herein grantee, herein grants, bargains, sells and quit claims unto the said Lewis Paullin all right or claim, or possible right or claim of dower that she may now or hereafter have in and to the said lands herein conveyed, in fee simple forever.

In witness whereof we hereunto set our hands and seals on this the 12th day of February, A. D. 1907.

E. E. FULLER.
ELLA R. FULLER.

UNITED STATES OF AMERICA,
Indian Territory, Central District

On this 12th day of February, A. D. 1907 appeared in person before me, the undersigned authority E. E. Fuller, personally well known to me to be the person whose names appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated and acknowledged to me that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Mrs. Ell. R. Fuller, wife *of* the said E. E. Fuller, to me personally well known and in the absence of her said husband, declared that she had of her *own* free will executed the said deed and signed the relinquishment of dower therein expressed, for the consideration and purposes therein contained and set forth, without compulsion or undue influence on the part of her said husband.

70 In testimony whereof I have hereunto set my hand and affixed seal on this 12th day of February, A. D. 1907.

LEWIS E. MARTIN,
Notary Public.

My Commission expires May 1, 1909.

Filed for record in my office this 20 day of February, 1907 at 11 o'clock A. M.

W. B. STONE,
Deputy U. S. Clerk and Ex-Officio Recorder.

Record 21, Page 550.

71 R. F. GRAFA a witness for the defendant, being duly sworn, testified as follows:

Q. What is your name?
A. R. F. Grafa.
Q. Where do you live?
A. In Durant.
Q. How long have you lived here?
A. About 13 years.
Q. What is your profession or business?
A. I am in the real estate business.
Q. Are you acquainted with the market value of land in and around Durant?
A. Yes, I think so.

Plaintiff objected, irrevelant, immaterial and inadmissable, objection overruled, plaintiff excepted.

Q. I'll ask you if you are acquainted with the land described in plaintiff's petition, the tract of land known as the Lonan tract of land?
A. Yes sir, I am.
Q. What is the market value of that land?

Plaintiff objected, the question was not the market value of the land now. Objection sustained.

Q. What was the market value of that tract of land on Jan. 31, 1906?

A. I should think it was reasonably worth $45.00 or $50.00 per acre, it is worth more than that now, it will sell for more than that now.

72 Q. And you say the reasonable market value of that land in Jan. 1906 was $45.00 or $50.00 per acre?

A. Yes sir, $45.00 or $50.00 an acre.
Q. How many acres are there in that tract?
A. 100 acres.

Plaintiff objected to all this testimony, because of its irrevelancy and asked that it be stri-ken from the record.

The COURT: I do not think that the testimony is competent, but I understand that this case will be appeared any way and I will leave the testimony in the record for the benefit of the Supreme Court.

Cross examination:

Q. How long have you been working for the defendant in this case?
A. Since 1904, 1903 I believe.
Q. What was the rental value of this land in 1901?

Defendant objected, because it was agreed in the agreed statement of facts.

Intervenor made same objections.

Q. Do you know of any land in Bryan County in 1906 or before or after that time selling for $45.00 or $50.00 an acre?
A. Yes, plenty of it.
Q. How much land was sold at that price?
A. Plenty of it.
Q. How close was it to town?
A. Right up to the corporation limits.
Q. How close is this land to town?
A. Hardly a quarter of a mile.
73 Q. Do you know anybody who would have given $45.00 or $50.00 an acre for it?

Defendant objected, that was not testimony.

Intervenor made same objection.

Q. What sort of land was that?
A. It is mostly prairie land, there is some little bottom land in it.
Q. Are there any ravines on it?
A. Not many bad ravines.
Q. It is all suitable for cultivation?
A. Not all of it, there is a small creek running through it that will take up two or three acres, may be four or five acres.
Q. And the balance of the land is suitable for cultivation, is there not about 20 acres of rock on this land?
A. No not that I know of on this particular piece of land.
Q. And you say that outside of this 4 or 5 acres the land is all suitable for cultivation?
A. No there is a little strip on the south side, there is a little branch that comes down there that will take up two or three acres, not over two acres I think.
Q. Then there would not be more than 6 or 8 acres that is not suitable for cultivation?

A. Yes, anybody that would buy the land would not object to that.

Q. Then you think that because some of the land was not suitable for cultivation that it would add to the value of the land?

A. Yes, on account of the drainage it gives, and on account of the timber on it, and the convenience of having wood on the land.

74 Q. This land that you say you know of selling for $45.00 or $50.00 per acre, did Eli P. Williams have a five years lease on that land?

Defendant objected, that was not the issue in the cause, the market value of the land was the issue.

Intervenors made the same objection

The Court: I will let go in the record, although I do not see that it is relevant.

Q. What do you say, did the land that sold for $45.00 or $50 an acre have a five or ten years lease on it?

A. No I do not think that it did?

The Court: I think this objection should be sustained, but as I said I will leave it in the record for the benefit of the Supreme Court. I do not think that any of this testimony is admissable.

Q. Do you know who composes the Choctaw-Chickawas Company?

Defendant objected: I think we have admitted that in the agreed statement of facts.

The Court: It is admitted that the three Williams have an interest in the Company, that they are interested in it.

Q. Have you an interest in that Company?

A. No sir.

Q. You are merely the agent here, the resident agent here?

A. Yes, sir.

Q. And you are the agent for all the Williams?

A. Yes, sir.

Interpleader objected to all the testimony of the witness R. F. Rafa and asked that it be stricken from the record.

The Court: I will permit it to go in, so that you can have a complete record, but I do not think that it has any effect on the issue in this case.

Interpleader excepted then and there in open Court to the ruling of the Court.

F. R. Robinson, a witness for the defendant, being duly sworn, testified as follows:

Q. Where do you live?

A. About a mile north of here.

Q. How long have you lived there?

A. About all my life.

Q. How old are you?

A. About 54 years old.
Q. Are you acquainted with the Thomas Loman allotment?
A. I can tell you all I know about that in a few words.
Q. Are you acquainted with the Thomas Loman allotment about a quarter or half a mile from Durant?
A. I sold Mr. Williams a place out there. I do not know when it was, the first year they commenced filing.
Q. Were was this improvement located?
A. South-west of town.
Q. What did you get for this improvement?
A. I reserved the house, and I got $650.00.
Q. Who paid you the $650.00?

Plaintiff objected, irrelevant, immaterial and inadmissable.
Objection overruled, plaintiff excepted.

A. Mr. Williams gave me a check.
Q. Did you collect the money?

Plaintiff objected, irrelevant, immaterial and inadmissable.
Objection overruled, plaintiff excepted.

A. Yes.
Q. Who gave you the check?
A. Mr. Elli P. Williams.

76 Plaintiff objected and asked the testimony be stricken from the record on the ground that it was not shown that the improvements were on the land in controversy.

The COURT: Of course if he does not connect it and show that the improvements were on this land it will be immaterial.

Q. Who subsequently allotted this land?
A. I could not tell you.
Q. Do you know what the field notes called for, what quarter section?
Q. Do you know the Thomas Loman place so-th-west of town?
A. Yes sir.
Q. Is that the same place?
A. Part of it is.

The COURT: You can show who cultivated it the past year, whether Maddox and Anderson cultivated it.

A. Mr. Anderson cultivated part of it.

PLAINTIFF: I think we can admit there were no improvements on the 100, there were improvements there but not on the 100 acres.

WITNESS: If it is the same land about 72 acres of it is in cultivation. I reserved the house and sold it to Will Durant. The land adjoins Will Durant's on the north, but I do not know anything about the section or the qurater, it is about a quarter of a mile from town and there is a lane running between that land and Will Derant's land running west.

77 Cross-examination:

Q. We want to get at this so that we will all understand it. There is a lane between this land and Durant's land, between Durant's land and the land that you let Mr. Williams have?

A. Yes sir. And there was a little corner that was left out over there, a corner that came up this way, and I bought it from Will Durant to make the land square.

Q. When you sold to Mr. Williams what improvements were there on what you know as the Loman tract?

A. There was a three wire fence and 75 or 80 acres in cultivation.

Q. Was there 75 or 80 acres out of the whole 200 acres of the Loman tract, was there as much in cultivation on the Loman tract as there was on the other tract?

A. I do not know which was his.

Q. In other words you had 200 acres out there?

A. Yes sir.

Q. How much of the 200 acres was in cultivation.

DEFENDANT: The agreed statement of facts shows that 75 acres were in cultivation.

A. About 75 or 80 acres. I never measured it, it might have been a little more and it might not have been so much.

Q. Was most of the 75 or 80 acres on the Loman tract or the other tracts?

A. I do not know which tract he filed on.

Intervenor objected to the agreed statement of facts showing that 75 acres was in cultivation.

Redirect examination:

Q. You were in possession of that piece of land at that time?

A. Yes sir. No one else ever owned that land except the Choctaw Nation and me.

78 Q. The possession of the right to allotment was what was wanted, the improvements were not worth as much as the right to allotment to the land for the reason that the land was so close to Durant?

A. Yes sir.

Q. I'll ask you if land right up against the city is not more valuable than land 5 or 6 miles away?

A. Yes sir.

Plaintiff objected, the question was leading.

The COURT: Of course the question is objectionable but we all know it is a fact, notwithstanding.

R. F. GRAFA, recalled.

Q. I'll ask you if you know whether the land that the improvements were bought by Mr. Williams from Mr. Robinson was afterwards alloted to Thomas Loman?

A. No, I do not think that it was.

Q. Who was formerly in possession of that land?
A. Mr. Robinson was.
Q. Mr. Robinson was formerly in possession of the Loman allotment?
A. Yes, that was my understanding.
Q. Do you know that?
A. I know that Mr. Robinson and Will Durant owned it or had something to do with it, they had listed the land with me for sale.
Q. Was that the Loman allotment?
A. Yes, there were on the east side of the tract. I understand that there was 160 acres in one block, 80 acres in each and there was another 40 acres that was divided and 20 acres went with each 80.

79 Q. And Loman filed on the east block?
A. Yes sir.
Q. Is that right north of Durant's place on the road to Cale?
A. No, it is not on the road to Cale, the road splits there——
Q. There is a lane through the land?
A. Yes sir.

Defendant rested.

80 *Plaintiff in Rebuttal.*

HUGH COX, a witness for the plaintiff being duly sworn testified as follows:

Q. What business are you in?
A. I am Secretary of the Citizens Loan & Realty Co.
Q. How long have you been in the real estate business here?
A. About two years.
Q. Do you know the Loman tract of land out here?
A. Yes sir.
Q. Are you well acquainted with it?
A. I have been on the land but I have never been over it thoroughly.
Q. Do you know what the market value of that land was in 1906?
A. I think I know.
Q. Is that land worth more now than it was in January 1906?
A. I think It is worth more now.
Q. What would you say was the fair market value of that land on January 1st, 1906?
A. I could not answer that definitely because I do not know how much of it was rough land or about the fencing.

Defendant objected, unless the witness knew the land and the market value of it.

The COURT: I will sustain the objection, you can ask him the hypothetical question.

Q. Suppose there are two ravines on the land taking in about 8 acres and that about 25 acres of the land is rocky and very rough?

Defendant objected, it was not a correct hypothetical question. Objection sustained, defendant excepted.

81 Q. How much would land like that be reasonably worth in Jan. 1906?

A. There are several other things that have to be taken into consideration before I can answer the question, the state of the fencing and such matters.

Q. With all necessary barbed wire fencing?

A. You want to know what I consider the fair value of this land in January, 1906?

Q. Yes.

Defendant objected because the witness does not show himself acquainted with the property and because the hypothetical question does not fit in with the record.

The COURT: Suppose the land in controversy lies near the town of Durant, within a quarter of a mile of the corporate limits, that 5 or 6 acres are taken up with ravines, and about 25 acres are covered with rock on the surface and loose stones, that it is fenced, what would be the value of that land in January, 1906? About 70 acres of the land being in cultivation?

A. The direction of the land from town would effect the price.

The COURT: I understand the land is south-west from town.

A. Shall I answer the question?

The COURT: Yes.

A. I should think it would be worth about $20.00 an acre.

82 Cross-examination:

Q. Do you know what the land right west of town, the land that come right up to the corporate limits sold for?

A. Yes sir.

Q. How much did it sell for?

A. $100.00 an acre.

Q. How far is this Loman tract from the land that sold for $100.00 an acre?

A. I suppose it is about a mile, possibly a little over. I never have measured it.

Q. What was the size of the tract of land on the west of town that sold for $100.00 per acre?

A. 90 or 100 acres.

Q. 90 or 100 acres on the west of town sold for $100.00 per acre?

A. Yes sir.

Q. Are you interested in that land?

A. No sir.

Redirect Examination:

Q. What is the relative value of lots on that side of the railroad compared with lots on this side of it?

A. Those on the north side of the railroad are four time as high.

Q. Worth four times as much as they are on the south side of the railroad?

A. Yes sir.

Q. I'll ask you if this land that was sold for $100.00 an acre was sold for residences or for farming?

A. It was sold for an addition to the town.

Q. Could that land over there, the Lonan tract, be used for that purpose?

A. No sir.

83 W. C. GOWER, a witness for the defendant, being duly sworn, testified as follows:

Q. You are an attorney?

A. I am in the land business.

Q. You are also a lawyer?

A. I used to be.

Q. Are you in the real estate business?

A. Not in the common acceptation of the term, but I am interested in real estate.

Q. Are you acquainted with the Lonan- tract of 100 acres?

A. Yes sir.

Q. I'll ask you how much of that land is covered with rock?

A. I never paid any attention to the exact number of acres, there is quite a corner of it covered with rock, my guess would be about 15 or 20 acres of it are injured by round flint bolts.

Q. From your knowledge of the land in 1906 what would be a fair cash market value for the land at that time?

A. I know I was buying land at that time, and I know that $20.00 an acre was a good price if the title was clear, and if there was a lease on the land the market value was problematical.

Q. Then you think $20.00 an acre was a reasonable market value for it in 1906?

A. Yes sir, I think that could have been obtained but I doubt whether any more than that could have been obtained for it.

Q. Was it worth more in 1906 than it is now?

A. No, land adjoining Durant was just like land in Durant, it is worth about double now to what it was in 1906.

84 Cross-examination:

Q. You do not mean to say that lots in Durant are worth double what they were two years ago?

A. Yes, lots on Main street and second and third avenues are. I have bought some and have doubled on them. Property of 3rd Avenue is worth $20.00 a foot and two years ago you could have got it for $10.00 per foot.

Q. What is the highest price that you have paid for land within half a mile of town?

A. I have some about a mile east that I paid $25.00 per acre for.

Q. That is across the creek, the Shuckwa?

A. It is across the same creek that this land is, it lies in the same position in regard to the creek, the creek curves around and this land I bought lies in the same position with regard to the creek as the Thomas Lonan tract does. That tract of land is closer to town than mine.

Q. And that makes a big difference in the value of the land?

A. It might, all other things being equal, but I do not think

this land is worth as much as mine, for the reason that mine is all smooth land, no creeks or rocks, and mine is very accessible. In getting at that Thomas Loman tract you have to cross the creek and it is very bad in muddy weather. That is not very valuable land over there and has never been rated as high as land on the other side of town. It does not sell as high as land on the other side of town and never has.

85 Q. What will you take for your land on the east side?

A. It is not for sale.

Q. What would you take for it if it was for sale?

A. I do not know what I would take for it. I have put out about five thousand peach trees that will be bearing in 1908, and I have a good house, barn, well and fences, and I cannot compare the value of my land with the virgin soil. I have expended about $3,000.00 on my land.

Q. Well you have told what you paid for the land and what you have expended on it, now what will you take for it?

Plaintiff objected, immaterial, irrelevant and inadmissible.

Q. What will you take for it now?

A. It is not on the market, but I will take $100.00 an acre for it and no less.

Q. You have some land in the north-west of town, what will you sell that for?

Plaintiff objected, irrelevant, immaterial and inadmissible.

A. My land north-west of town joins two additions to the town and I guess my land there is worth $100.00 an acre.

Q. What is that Kickerson-Durant addition land worth, that north of the corporation limits?

A. That addition has not been brought in yet. Taking it altogether I think $100.00 an acre would be a big price for it. I take it that $60.00 per acre would be a good price. I have not been over this land much and do not know much about it, but the value of that land now and its value in 1906 is very different.

Q. And the value of the Loman land is very different now to what it was in 1906. If you owned that 100 acres now with a good title——

86 Plaintiff excepted, immaterial irrelevant and inadmissible, objection overruled and plaintiff excepted.

A. I think it would be worth about $45.00 an acre, not less than $40.00 an acre.

Redirect Examination:

Q. What is the proportional value of property on this side of the railroad and property on the other side of it?

A. Property is from 50 to 75% higher on this side of the railroad than it is on the other side. Of course it would depend on the location of the property, whether it is on a ridge or down in a depression.

Q. I'll ask you what your property is used for?

A. To build homes, for residences.
Q. And that is what makes it valuable?
A. Yes sir.
Q. Can that Loman tract be used for that purpose?
A. Not in our times, it is not now over approximately considered as a place for residences and it is only worth what it will produce from the rental.

87 J. H. DOWNING, a witness for the plaintiff, being duly sworn, testified as follows:

Q. Are you acquainted with the Thomas Loman 100 acre tract of land out here?
A. Yes sir.
Q. What business are you in?
A. Now?
Q. Yes sir.
A. I am Secretary of the Farmers Land & Trust Co.
Q. That is a real estate agency?
A. Yes sir.
Q. How long have you been in Durant?
A. About eight years I think.
Q. I'll ask you if you know what the reasonable market value, cash market value of that 100 acres of land was in January, 1906?
A. Yes I think I do.
Q. What would have been the value?
A. About $20.00 an acre, $20.00 or $25.00 an acre.
Q. $20.00 or $25.00 would be the limit?
A. Yes sir.
Q. I'll ask you if you bought some land in the same neighborhood?
A. Yes I did.
Q. What did you pay for it?
A. I believe it was in 1904 that I bought it.
Q. What did you pay for it in 1904?

Defendant objected to what he paid for land in 1904, objection sustained.

88 Q. What was the value of the land at that time you bought it?
A. I can tell you what I paid for it.

Plaintiff closed.
Defendant closed.

For the Intervenor.

It was admitted that Hagon John is the legal guardian of the minor children, Oscar and Anna Loman.

For the Plaintiff.

HAGON JOHN, being duly sworn, testified as follows:

Q. What is your name?

A. Hagon John.

Q. Do you know Eli P. Williams?

A. Yes I know him.

Q. When did you first get acquainted with him?

A. He there.

Q. When did you first know him, when did you first meet him?

A. About two years ago.

Q. Did he get you to qualify as guardian of these two minor children?

A. Yes.

Q. Did he pay the expenses of the guardianship?

Intervenor objected, it had nothing whatever to do with any issue in this cause.

THE COURT: Of course it is objectionable, but we will let it go in the record with the statement that the Court does not think it competent.

Q. Did he pay for expenses?

A. Yes he.

Q. When did you first know that you had brought suit for this land, yesterday?

A. About August I reckon.

Q. Did he tell you?

A. Mr. Williams.

Q. When did you first know that Mr. Maxey was your lawyer?

89 A. I did not know.

Q. You did not know it until you came to court today?

A. He tell me pretty good land, he get it for me, I say all right.

Q. When did you first see Mr. Maxey, that gentleman over there?

A. Today.

Q. Who came after you?

A. Old man.

Q. Old man Williams?

A. Yes.

Q. Who paid your way?

A. He did.

Q. Did he give you anything extra for coming?

A. He said give me some more some time maybe.

Q. Who got you appointed as guardian?

A. Mr. Spaulsing he fix it for me in letter, you want to see it now?

Q. No, I do not want to see it, who employed him, your or Mr. Williams?

A. Mr. Williams.

Q. The truth of the business is that you do just what the old man tells you to do?

INTERVENOR: I object if the Court pleace, this has gone far enough.

90 THE COURT: That has nothing to do with the case, he is the legal guardian of the minors, and counsel has a perfect right to defend him and look after the interest of the minors.

PLAINTIFF: I had no intention whatever of casting any reflections on my friend. I simply wanted the record to show that Mr. Williams was figthing the lease and at the same time backing it up. *time backing it up.*

THE COURT: I believe I understand Mr. Williams' position.

And this was all the evidence introduced in the trial of said cause.

91 LEWIS PAULLIN
VS.
CHOCTAW-CHICKASAW INVESTMENT CO. et als.

Comes now the plaintiff herein and replying to defendants' answer and interplea of Hagon John, denies that he or any one through whom he claims title to the land herein, and denies that said parties that obtained said deeds through fraud and undue influence, but that same was brough after the said Lonan's restrictions had been by the Indian Agent without undue influence, and that all of said grantees mentioned in said complaint herein paid the reasonable value for said land and more than said land, incumbered as this land was bringing at that time; that said land was so far as plaintiff know had been sold for all it was worth and that if said deed to Hawk was for less than $150,000, this plaintiff did not know the same.

Plaintiff further says that Hagon John is not prosecuting this suit, but that the same is done by the defendant Williams, that Williams had him appointed guardian of said minors and employed N. B. Maxey to press said suit and brought said Hagon John here, paid his way, and that the said John never saw said Maxey until this morning when he came into this Court.

ROBERT CROCKETT.
UTTERBACK & HAYES.
Att'ys for Plaintiff.

92 THE COURT: I believe I understand Mr. Williams' position.

And this was all the evidence introduced in the trial of said cause.

Plaintiff Closed.

THE COURT: There is no doubt whatever in my mind but that at the death of Thomas Lonan that the power of attorney was revoked.

Defendant excepted to the ruling of the Court.

THE COURT: I am satisfied beyond any sort of a doubt that the intervenor has no standing in this case, because according to the pleadings and the facts this man Lonan had his restrictions re-

moved before he sold the land to Hawk and Hawk conveyed it to Fuller and Fuller to the plaintiff.

There is no evidence to show that the plaintiff had any notice that there was anything wrong with the title, and there is no proof that he had any notice that Loman was incapable of making business deals, there is no proof whatever of anything of this kind, therefore I have no doubt but what the title of Mr. Paullin is good, if there is a title on this country that is good I think Mr. Paullin has it.

The COURT: Then there is another question is regard to the lease and one that is troublesome, but I do not see why if he had a right to make a contract for five years for land he had not a right to revoke that contract and enter into a new agreement, taking up the old contract and making a new one for five years. There is no reason in the law that I can see why a man should not be able to release a lease and make a new one if he so desires it.

93 PLAINTIFF: That is true as a general proposition, but from the proof in this case can the Court tell which of the leases is in force?

The COURT: I think the last lease is the one you are attacking?

PLAINTIFF: We are attacking all the leases.

DEFENDANT: I take it they are attacking the last lease, all the other leases have been abrogated.

The COURT: That is the way I understand it. I believe that there is only one lease in force. It is claimed that all these leases are for the same consideration and are gotten up in the same way to evade the law with regard to leases for five years. The proof in this case however, as far as it shows anything, that Mr. Williams, with regard to the consideration, it shows, I say, that as far as consideration is concerned, that Mr. Williams, the man claiming under the last alleged lease, paid for the land in controversy before it was filed on. The first lease recites a consideration of $25.00 a year I believe, and the last lease between Williams and Loman recites that he has received $225.00 and that Mr. Williams will also pay him $25.00 a year from that time on. In other words, this lease seems to have been in consideration of the amount paid by Mr. Williams according to the proof, before the lease was made. The proof shows that he paid this money for the land before it was filed, and after it was filed on the lease was made to the Choctaw-Chickasaw Co., and then afterwards to Mr. Eli P. Williams and that it recited a consideration of $225.00 paid and $25.00 a year afterwards to be paid.

94 All these leases were surrendered and I take it that there is only one lease in existence, the last lease.

PLAINTIFF: I understand that we can plead at any time and I would like to have time to deny this, because the record shows that none of the leases have been surrendered.

The Court denied plaintiff leave to amend after the case had been closed, and stated that the answer alleged that the leases had been surrendered and cancelled between the parties.

PLAINTIFF: But he makes that allegation in contravention of the agreed statement of facts.

The COURT: There is nothing said in the agreed statement of

facts about it. Of course if he had simply loaned the money or invested it he would not be able to collect usury or anything of that sort, but the proof shows that he advanced the money and placed this Indian in a position to file on this particular piece of land.

PLAINTIFF: I do not think that the record shows that Eli P. Williams placed this Indian on that land, or aided him. He might have had another Indian in view when he bought the improvements on the land.

The COURT: The record shows that Thomas Loman obtained the benefits and under these circumstances the court does not feel justified in scrutinizing the actual money consideration as closely as he would under different circumstances, and I do not think that the consideration for that lease was so grossly inadequate as that the Court would feel justified in setting aside the lease under the circumstances in this case. It is alleged here that the Indian
95 was incompetent, nor able to look after his business, that he was easily overreached in transactions of this sort, but in my mind the party claiming under the title has a good title through the finding or holding of the Secretary of the Interior that this Indian was competent, and that he did not derive his title direct from the Indian, and therefore I hold that his title is good.

So the decree of the Court will be that the Intervenor take nothing on his plea of intervention.

The court finds that on application to the Secretary of the Interior the restrictions of the said Thomas Loman were removed and that Loman sold the land to Hawk for a consideration as appears in the record of $1,500.00, that Hawk afterwards conveyed the land to Fuller for a consideration of $2,700.00 I believe and that Fuller afterwards conveyed the land to the plaintiff, Mr. Paullin for a consideration of $2,800.00. All these conveyances and the removal of the restrictions of Thomas Loman are in the record and the Court finds that Paullins bought the land from Fuller without any notice or knowledge of any defect in the title, or the incompetency of the allottee and that therefore he has a good title, that the heirs of the allottee cannot attack him or his title because he is an innocent purchaser, with no knowledge or the competency or incompetency of the Indian and for the further reason that the finding of the Secretary of the Interior as to the removal of the restrictions was an adjudication that he was competent to sell or dispose of his surplus allotment.

96 The court finds further from the record that the consideration from Mr. Hawk to the allottee was not inadequate, or if slightly inadequate was not so inadequate as to justify the Court in setting aside the deed, and I may say that I do not consider the consideration at that time inadequate at all.

The court further finds that the power of attorney from Thomas Loman to Chas. H. Williams was revoked with the death of Thomas Loman, because at the time of the granting of the power of attorney Loman could not convey any interest in the land, and for the further reason that the consideration for an interest in the land, even

if the allottee could have conveyed such an interest, was grossly and entirely inadequate.

The COURT: On motion of counsel it is agreed that the agreed statement of facts shall go up as part of the finding of the Court.

The COURT: The Court further finds that the defendant retain his lease, as called for in the lease, and that he is indebted to the plaintiff the rent on the land at the rate of $25.00 a year.

Plaintiff renewed his request for judgment for $50.00 under the terms of the lease, which was held good by the Court, but they did not waive their rights in asking for the judgment.

The COURT: I find that the present owner of the land, Mr. Paullin, is entitled to the rent due and to become due in accordance with the terms of the lease, and that he is entitled to a judgment now for $25.00 for the rent of the land for the year 1907, for which let execution issue.

97 Interpleader excepted then and there in open Court to the ruling of the Court.

The COURT: The court finds that the Intervenor shall pay all cost of the intervention, and that the plaintiff and the defendant pay the balance of the costs, each to pay one half of the balance of the costs after the costs of the intervention has been paid.

Plaintiff excepted to the ruling of the Court that he should pay half the balance of the costs after the costs of intervention had been paid.

Plaintiff excepted then and there in open court to the ruling of the Court holding the lease of the defendant good.

Defendant excepted then and there in open Court to the finding of the Court that he should pay half the costs after the costs of intervention had been paid, and also excepted to the ruling of the Court in holding that the title of the plaintiff to the land in controversy was good.

Intervenor then and there excepted to the finding of the Court that he should pay the costs of intervention, also to the ruling of the Court in finding the title of the plaintiff good and also to the finding of the Court that the lease of the defendant on the land in controversy was good.

The court allowed all the exceptions and granted Intervenor 60 days, also Charles H. Williams and Lewis Paullin, in which to make "case made" and 20 days thereafter for all parties to prepare and file suggestions of amendment and ten days thereafter to settle "case made."

Filed May 20 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

98 Record District Court of Bryan County, State of Oklahoma, December Term, 1907, Saturday, Jan. 11 1908.

Filed May 20 1908. W. H. L. Campbell, Clerk of the Supreme Court, by ——— ———, Deputy.

No. 916.

LEWIS PAULLIN
vs.
CHOCTAW & CHICKASAW INVESTMENT CO. et al.

On this 11th day of January, A. D. 1908, the same being a regular Court day of the December Term of this Court this cause on to be heard and the plaintiff appeared in person and by his attorneys, and the defendants appeared by their attorneys and the interpleader appeared in person and by his attorney and all parties announced ready for trial and this cause being a non-jury case the matters of fact as well as of law were submitted to the Court, upon the complaint, answer, reply and intervening petition, agreed statement of fact and additional testimony offered at the trial, and after hearing the evidence and argument of counsel and being well and sufficiently advised the Court finds that the intervenor has shown no right in himself or the minor heirs for whom he is guardian either in law or equity and that the prayer of his petition should be denied and refused.

99 And the Court finds that the power of attorney from Thomas Loman to Chas. H. Williams should be cancelled and annulled and the Court finds that the defendant Eli P. Williams is indebted to the plaintiff in the sum of $25.00 for the rent of the land in controversy for the year 1907.

And the Court further finds that the lease to the Choctaw-Chickasaw Investment Co., and to Elmer Williams were revoked and cancelled by the lease to Eli P. Williams.

And the Court further finds that the lease from Thos. Loman to the defendant Eli P. Williams is a good and valid lease and that the prayer of plaintiff's petition that said lease should be annulled, should be denied, but that said lease should remain in full force and effect until the expiration of the term mentioned therein.

It is therefore considered, ordered and decreed by the Court that the intervenor take nothing by his intervening petition, that the prayer of the same be denied, and that the intervening petition be dismissed.

It is further considered, ordered and decreed by the court that the power of attorney from said Thos. Loman to Chas. H. Williams be and the same is hereby set aside annulled and cancelled.

It is further ordered, adjudged and decreed by the Court that the prayer of the plaintiffs asking for the cancellation of the lease to Eli P. Williams be and the same is hereby refused and denied.

100 It is further ordered, adjudged and decreed by the Court that the plaintiff Lewis Paullin have and recover from the defendant Eli P. Williams the sum of $25.00 for which execution may issue.

It is further considered, ordered and adjudged by the Court that the intervenor pay all the costs of the intervening petition and that plaintiff and defendant each pay half the remaining costs of the cause.

And the intervenor except to the findings and decrees of the Court in dismissing intervening petition and adjudging the costs of said petition against him.

And the defendant excepted to the finding and judgment of the court that defendants Eli P. Williams was indebted to plaintiff in the sum of $25.00.

And plaintiff excepts to the findings of the Court, that the lease to Eli P. Williams, from Thomas Loman is a good and valid lease, and should not be cancelled and annulled, but should remain in full force and effect until the expiration of the time for which it was given.

And both plaintiff and defendant except to the order of the Court that they each pay half the costs of this cause.

101 In the District Court Within and For the County of Bryan and State of Oklahoma.

#916.

LEWIS PAULLIN, Plaintiff,
vs
CHOCTAW-CHICKASAW INVESTMENT COMPANY et al., Defendants;
HAGON JOHN, Guardian, Intervenor.

Motion for New Trial.

Comes now Hagon John, guardian of Oscar Loman and Annie Loman, minors, and intervenors in the above entitled cause and moves the court to set aside the judgment and decree entered against them in this cause for the following reasons, to-wit:

1.

The Court erred in admitting in evidence the order of the Secretary of the Interior removing the restrictions of Thomas Loman, deceased, over the objection of the intervenors, which was excepted to at the time.

2.

The Court erred in holding as a matter of law, that the order of the Secretary of the Interior, which was admitted in evidence, was an adjudication of the competency of Thomas Loman and that intervenors were estopped from setting up his incompetency to avoid

the deed executed by him after the removal of his restrictions, whic was excepted to at the time.

102

3.

The Court erred in holding that Fuller and Paullin, subsequen purchasers from the grantee of Thomas Loman, had a right to rel on the order of the Secretary removing the restrictions as an adjudi cation of his competency and that they were innocent purchasers and intervenors could not defeat their title by showing the incom petency of said Thomas Loman, which was excepted to at the time.

4.

The Court erred in entering a decree dismissing intervenor petition for want of equity, which was excepted to at the time.

Wherefore, they pray that said judgment and decree be set aside and a new trial granted.

(Signed)

N. B. MAXEY,
Attorney for Intervenors.

103 In the District Court Within and for the County of Bryan and State of Oklahoma.

#916.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW INVESTMENT COMPANY, et als., Defendants, Intervenor.

Motion for New Trial.

Comes now Charles H. Williams, defendant in the above entitled cause and moves the Court to set aside the judgment and decree entered against him in this cause for the following reasons, to-wit:

1.

The Court erred in holding that the power of attorney executed by Thomas Lowman to this defendant expired with the death of the said Thomas Loman, which was excepted to at the time.

2.

The Court erred in cancelling the said power of attorney which was excepted to at the time.

3.

The Court erred in its findings of fact and decree entered against this defendant in this cause, which was excepted to at the time.

104 The Court erred in holding that the deed executed by Thomas Loman after the removal of his restrictions, to S. A. Hawk, was superior to the power of attorney executed to this defendant, which was excepted to at the time.

Wherefore, defendant prays that said judgment and decree be set aside and a new trial be granted him in this cause.

(Signed) CROOK & KYLE,
Attorneys for Defendant.

105 Record District Court of Bryan County, State of Oklahoma, December Term, 1907, Monday, Jan. 13, 1908.

Court met pursuant to adjournment, present and presiding the Hon. M. E. Rosser, District Judge.

Whereupon the following preceedings were had to-wit:

916.

LEWIS PAULLIN
vs.
CHOCTAW-CHICKASAW INVESTMENT CO.

Filed May 20 1908.W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

Now on this day comes Chas. H. Williams defendant herein and files motion for new trial, the Court being well and sufficiently advised in the premises overrules said motion, to which ruling of the Court, defendants except.

916.

LEWIS PAULLIN
vs.
CHOCTAW-CHICKASAW INVESTMENT CO.

Filed May 20 1908.W. H. L. Campbell, Clerk of the Supreme Court. By —— ——. Deputy.

Now on this day comes Hagon John intervenor herein and files motion for new trial, the Court being well and sufficiently advised in the premises overrules said motion, to which ruling of the Court intervenor excepts.

106 LEWIS PAULLIN, Plaintiff
vs.
CHOCTAW-CHICKASAW INVESTMENT COMPANY et als., Defendant.

Comes now the plaintiff herein and files this his motion asking the Court to set aside a judgment entered herein, and give him judgment cancelling the leases to the Choctaw-Chickasaw Investment

Company, Elmer Williams and Eli P. Williams, in addition to a power of attorney to Charles H. Williams, and shows to the court that the testimony in the case shows that said transactions between the said Thomas Loman and all the defendants herein were for the sole purpose and intended to extend the leases on said land for a period of more than five years, and further that the consideration for said lease on said land is less than one-half the rental value of said land for said time, as shown by the agreed statement of all the parties herein, and this fact, while not sufficient probably alone to set aside said leases, yet when you take*n* into consideration the facts that the first lease was made on the day that the said Loman filed said land, and that he was signing instruments which was conveying an interest in his land, and putting a cloud thereon for a period of twenty years, all of which was at the instance, request and for the benefit of the defendants herein, then we believe that these facts, taken all together showed that the Said Thomas Loman was imposed upon by these defendants, and that the consideration being so inadequate, taken with the other facts, should *be*t said leasses aside and cause them to be cancelled, or to permit said land, situated as this land, to be rented for less than One Dollar per acre to parties
107 who have recorded so many instruments affecting said land, and especially the power of attorney, which put the sole control or sought to put the sole control in the hands of these defendants for a period of twenty years, and shows the design and the intent with which all these instruments were taken from the said Thomas Loman.

If the said transaction had been in good faith and for- with no design on the part of the defendants except to make a five years' lease and pay a reasonable price therefor, the consideration expressed in the lease to Eli P. Williams, in all good conscience would have been paid in the first lease made by said Loman, and the defendants, who are all interested in each and every lease, and plaintiff shows that, taking all these acts on the part of the defendants into consideration, and the great injustice which would have been done to allow these people to have this land except *for* a per*iod* of two years longer for the pit-ible sum of Twenty-Five Dollars per annum would be a gross injustice to these plaintiffs.

Premises considered, Plaintiffs pray that the court set aside the orders heretofore made by him, especially as to said leases to the said Eli P. Willia-s, and that he make an order cancelling said leases, and giving the plaintiffs herein an order for the possession of said premises.

____ ____.

Att'ys for Plaintiff.

108 Record District Court of Bryan County, State of Oklahoma, December Term, 1907, Jan. 13, 1908.

916.

LEWIS PAULLIN
vs.
CHOCTAW-CHICKASAW INV. CO.

Now on this day comes the plaintiff and files motion to set aside judgment and cancel lease.

Thursday, Jan. 16, 1908. December Term, 1907.

Court met pursuant to adjournment. Present and presiding, the Hon. M. E. Rosser, District Judge.

916.

LEWIS PAULLIN
vs.
CHOCTAW-CHICKASAW INVESTMENT CO.

On this day came on to be heard plaintiff's motion to set aside the judgment herein so far as said judgment failed to cancel the lease of Thos. Loman to Eli P. Williams. And after hearing the same and being well and sufficiently advised the Court overrules said motion of said action of the Court the Plaintiff excepts and thereupon the Court allows the plaintiff, defendant and intervenor each or either of them 60 days in which to make case made and allows the opposite parties 20 days thereafter in which to file suggestions of amendment and allows 10 days thereafter in which to settle and file case made.

Filed May 20, 1908. W. H. L. Campbell, Clerk of the Supreme Court. By —— ——, Deputy.

109 In the District Court of Bryan County, State of Oklahoma.

#916.

LEWIS PAULLIN, Plaintiff,
vs.
CHOCTAW-CHICKASAW INVESTMENT COMPANY et al., Defendants; HAGON JOHN, Intervenor.

Be it remembered that on this 27th day of March, 1908, at the hour of 9 o'clock A. M., at the Court house in the City of Durant, in the County of Bryan and State of Oklahoma, the above and foregoing Case Made was presented to me, Malcolm E. Rosser, Judge

of the district Court of Brayn County, said state and before whom said cause was tried, to be settled and signed as the original Case Made herein, as required by law, by the parties to said cause; and it appearing to me that said Case-Made has been duly made and served upon the plaintiff and other parties of interest within the time fixed by the order of the Court, and in the time and manner and form as prescribed by law; and that all parties are present in the person of their respective attorneys of record and said plaintiff having waived the presentation of amendments to said case made and the Court being well and fully advised in the premises and the said case made having been examined by me, is true and correct, and contains a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in said cause, I hereby allow, certify and sign the same as the true and correct Case Made in said
110 cause, and hereby order the Clerk of said Court to attest the same with his name and the seal of said Court, and file the same of record, as provided by law.

Witness my hand, this 27th day of March, 1908.

[SEAL.] MALCOLM E. ROSSER,
Judge of the District Court of
Bryan County, Oklahoma.

Attest:

W. R. COLLINS,
Clerk of the District Court of
Bryan County, Oklahoma.

111 Endorsed on the back in letters and figures as follows towit: "#202. Filed May 20, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy.

112 In the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and correct copy of the Original Case made in the case of Hagon John, Guardian, Plaintiff in Error, vs. Lewis Paullin, et als., Defendants in Error, filed May 20th, 1908, as the same remains on file in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said Supreme Court, this April 20th, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court,
By REUEL HASKELL, JR., *Deputy.*

112½ In the Supreme Court of the State of Oklahoma.

No. 202.

HOGAN JOHN, Guardian, Plaintiff in Error,

—

LEWIS PAULLIN, Defendant in Error.

Motion.

Comes now Lewis Paullin, Defendant in Error, and shows to the Court that this case was filed in the Supreme Court on the 20th day of May, 1908 by petitioner in error; that up to this time Plaintiff in error has never filed copies of his Brief in the Supreme Court, nor has he ever served his brief on Counsel for the Defendant in Error, or on the Defendant in Error.

Defendant in Error further shows that not only has Plaintiff in Error failed to comply with Rule #7 of this Court with reference to filing brief and serving same on Defendant in Error, but that he has never communicated with either the Defendant in Error, or his counsel with reference to the granting of more time in which to comply with said rule #7, nor so far as Defendant in Error is advised, has he taken any steps whatever to comply with said rule and Defendant in Error believes and charges that it is the purpose of the Plaintiff in Error to hold this case up for the purpose of induring a settlement, and not for the purpose of having the merits passed upon by the Supreme Court.

From the above and foregoing fact Defendant in Error would show to the Court that the actions of the Plaintiff in Error, and his attorneys in making no attempt to comply with Rule #7 of this Court, is, as Defendant in Error believes and charges, sufficient ground upon which the Court should take notice that he has used no diligence whatever, and that this case should either be affirmed, or dismissed for want of prosecution and Defendant in Error asks the Court to pass upon said motion and either affirm said case, or dismiss the appeal herein for want of prosecution.

V. B. HAYES,
Attorneys for Defendant in Error.

113 STATE OF OKLAHOMA,
County of Bryan, ss:

Comes now V. B. Hayes, one of the attorneys for Lewis Paullin, Defendant in Error, and being first duly sworn deposes and says that on October 27, 1908, he served Crook & Kyle, attorneys of record in said cause for the opposing parties, a true and correct copy of the foregoing motion.

Witness my hand this the 27th day of October, 1908.

V. B. HAYES.

Subscribed and sworn to before me this 27th day of October, 1908.
[SEAL.] LENA WILKINSON,
Notary Public.

My Commission expires Dec. 2, 1911.

Endorsed: No. 202. Hogan John, Guardian, Plaintiff in Error, vs. Lewis Paullin, Defendant in Error. Motion. Overruled. Defendant Allowed 30 Days. Filed October 30th, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy. Utterback & Hayes, Attorneys for Defendant in Error.

114 And thereafter to-wit: on the 11th day of November, 1908, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause.

"Supreme Court, November Term, 1908. November 11th, 1908. Second Judicial Day.

#202.

HOGAN JOHN, Guardian, Plaintiff in Error,
vs.
LEWIS PAULLIN et al., Defendants in Error.

Ordered by the court that the motion of defendants in error to dismiss appeal, be, and the same is hereby overruled, and defendants in error are hereby allowed 30 days in which to file brief.

115 In the Supreme Court of the State of Oklahoma.

No. 202.

HOGAN JOHN, Guardian, etc., Plaintiff in Error,
vs.
LEWIS PAULLIN et als., Defendants in Error.

Comes now the defendant in error, Lewis Paullin, and shows to the court that the appeal in this case should be dismissed and for cause, states that all of the defendants in error in this suit were not brought into this court by the process of this court, summons was not issued directing them to appear in this court, nor did they make their voluntary appearance in this court within twelve months from the date upon which the final order of the District Court was entered in said cause; that from the transcript on file in this Court on Page —, the order of the court overruling the motion for a new trial was entered and made on January 13, 1908 and the summons in error in this cause was not issued until January 22, 1909.

Wherefore the said Lewis Paullin prays judgment of the Court

on this motion and that said appeal be dismissed and said cause be striken from the docket of this Court.

ROBT CROCKETT AND
V. B. HAYES,
Attorneys for Defendant in Error.

Endorsed: No. 202. Hogan John, Guardian, etc., Plaintiff in error, vs. Lewis Paullin, et als., Defendants in error. Motion to Dismiss. Filed March 3rd, 1909. W. H. L. Campbell, Clerk. Robert Crockett and V. B. Hayes, Attorneys for Lewis Paullin.

116 In the Supreme Court of the State of Oklahoma.

HAGON JOHN, Guardian of Oscar Loman and Anna Loman, Minors,
Plaintiff in Error,
vs.
LEWIS PAULLIN et al., Defendants in Error.

Response to Motion to Dismiss.

Comes now Hagon John, Guardian of Oscar Loman and Anna Loman, minors, and in response to the motion to dismiss filed by the defendants in error, says:

I.

That said motion should not be sustained for the following reasons, to-wit:

1. That the decision on the question raised by the appeal in this case will not in any manner affect the rights of the defendants in error, not served in this cause, and they are therefore not necessary parties defendants in error in this cause.

2. That all of the defendants in error who are or were parties defendants in the court below, have also appealed to this court, and the said appeal is now pending in this court, being No. 482 on the Docket of this court.

Therefore, all of the parties both plaintiff, defendant and intervenors in the court below are before this court, and if it should be determined that the defendants below are necessary parties defendants in error, the two appeals now pending could be consolidated
117 in this court and heard together, and the court would thus have all of the parties before it, and the plaintiffs in error hereby ask the court to consolidate said two appeals and hear them together as one case.

MAXEY & RUNYAN,
Attorneys for Plaintiff in Error.

Argument.

This suit was originally commenced by Lewis Paullin one of the defendants in error against the other defendants in error, to recover the possession of 80 acres of land, which Paullin claims to have

purchased from Thomas Lonan, in his life time. An examination of the records will show that the plaintiff in his complaint alleged that at the time Thomas Lonan executed the leases to the defendants, that he was incapable of making any kind of a business contract, and know what he was doing, for the reason that he was old, Blind, weak-minded, a full blood Choctaw, and could neither read, write nor speak the English language, etc.

The defendants below in their answer, admitted that Lonan was weak-minded, old, a full blood Choctaw, and utterly incapable of understanding a business transaction, such as the leasing or selling of real estate. The plaintiff and defendant *hnen* filed an agreed state of facts, and one of the facts agreed to was, that Lonan was old, weak-minded, illiterate, and could neither read, write or speak the English language, and utterly incapable of transacting any business such as the sale or lease of lands. Under the issues thus made, and the facts agreed to, the case was set down for trial, but before the trial, Hagon John, as Guardian of Oscar and Anna Lonan intervened in said cause by leave of the Court, and
118 asked to have the deed made by Lonan to Paullin set aside and cancelled, on the ground that Lonan was not capable of making a conveyance at that time. The court below after hearing all of the evidence, dismissed the plea of intervention of Hagon John, Guardian, on the ground that it was shown by the testimony that Thomas Lonan had had his restrictions removed by the Secretary of the Interior, and that that was an adjudication of his competency to transact his own business, and adjudged that the intervenor pay all the costs of intervention. It is from this order and decree that Hagon John appeals and asks for a reversal. Now, this can in no way injuriously affect the rights of the defendants in the case below, and under the decision of this court in the case of Strange vs. Crismon, we think it wholly immaterial whether the defendants below were served as defendants in error in this case or not. The case of County Commissioners vs. Harvey et al., 5th. Okla., 171, and cited by this court in the case of Strange vs. Crismon, appears to us to be conclusive of our contention in this case. The court there said after reviewing the numerous authorities on the subject:

"From these numerous authorities, it would appear that the proposition as to what parties must be brought before the Supreme Court in order to *warrant* a review of the question sought to be presented on appeal, has been adjudicated and the rule clearly fixed; and the rule appears to be that all persons who were parties to the proceedings in the trial court and whose interests will be affected by a reversal of the judgment must be brought into the appellate proceeding. And also where the interests of those who are brought as parties into the appellate proceeding will be injuriously affected by a reversal or modification of the judgment complained of as to such parties without the reopening of the case as to the other parties so to whose interests the judgment has become final by failure to appeal, so likewise the proceeding will be dismissed."

The Court will observe from the above quotation, that all
119 of the parties whose interests would have been affected by the decision of the court in that case was, through failure to

appeal or be made parties to the appeal brought. Not so in this case. In the first place the defendants below will not be in any way affected by the decision on the appeal of Hagon John, as that will only settle the question as to whether the court below was right in dismissing his plea of intervention. If this court should hold that the court below erred in dismissing the petition, the case would then go back for a new trial, where all of the parties would then be before the trial court, on the issues made between the plaintiff and defendant, and also on the issues made by the plea of intervention. In the second place, the intervenor has appealed in this case, and the defendants below have also appealed and all of the parties are before this Court, and if it should be determined that the defendants below should have been made parties defendant in Hagon John's appeal and served, yet that is cured by the defendants below also appealing to this court, and this court could and should consolidate the two appeals and try them as one case.

It appears to us that this would be the proper course to pursue, and that justice could be dealt out to all of the parties, and we therefore ask that the motion of the defendant in error be denied.

MAXEY & RUNYAN,
Attorneys for Plaintiff in Error.

[Endorsed:] No. 202. Hagon John, Gd'n., vs. Lewis Paullin, et al., Response to Motion to Dismiss. Filed Mar. 17, 1909. W. H. L. Campbell, Clerk. Maxey & Runyan, Attorneys for Respondent.

120 In the Supreme Court of the State of Oklahoma.

HAGON JOHN, Guardian of Oscar Loman and Anna Loman, Minors, Plaintiff In Error,

vs.

LEWIS PAULLIN, Choctaw-Chickasaw Investment Company, a Corporation; Elmer Williams, Eli P. Williams, Chas H. Williams, A. T. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants In Error.

Cross-Motion for Leave to Complete Service on Other Defendants in Error.

Comes now John, Guardian of Oscar Loman and Anna Loman, minors, and files this his cross-motion in response to the motion of the defendant in error Lewis Paullin to dismiss this action, and prays the court for leave to serve the defendants in error, the Choctaw Chickasaw Investment Company, a Corporation, Elmer Williams, Eli P. Williams, Chas. H. Williams, A. T. aBnks, Tom Anderson, —— Maddox, and —— Thomas and for grounds of his said motion says:

I.

That the defendant in error Lewis Paullin, filed a motion in this case to dismiss on the — day of ——, 1908, on the ground that the

plaintiff in error had not filed his brief within the time prescribed by the rules of this court, which said motion was by the court denied because the plaintiff had filed his brief at the time of the hearing of said motion, and the defendant was given 30 days in which to file his brief, and said defendant in error has not filed his brief in accordance with said rule and is himself in default in this case, not having filed his brief up to the present time, and he is in
121 no position to invoke the aid of this court in support of his motion when he himself is in default, and has been in default for more than three months past.

II.

That the plaintiffs in error, Oscar Loman and Anna Loman, are minors, as shown by the record in this case, and are excepted by the statute from the rule invoked by the defendant in error, Lewis Paullin, in his motion to dismiss, as will be seen by Section (1748) 550 Wilson's Digest, page 1097 of Vol. 2, which section is as follows:

"(1748) Sec. 550. No proceeding for reversing, vacating or modifying judgments or final orders shall be commenced unless within one year after the rendition of the judgment or making of the final order complained of, or in case the person entitled to such proceeding be an infant, a person of unsound mind, or imprisoned within one year as aforesaid, exclusive of the time of such disability."

Plaintiffs in error therefore pray, that the motion of the defendant in error, Lewis Paullin, be denied, and that they be permitted to serve the other defendants in error above named, within a reasonable time to be fixed by the Court.

MAXEY & RUNYAN,
Attorneys for Plaintiff in Error.

Argument On Cross-Motion.

On the first ground of the cross-motion of the plaintiff in error for leave to complete service in this case, it will be observed from the language of the first ground of said motion, that it is based upon the fact that the defendant in error, who files this motion now to dismiss, filed a motion several months ago to dismiss upon the ground that we had not filed our brief within the time prescribed by the rules of the court. The court will remember that the
122 published rules of this court were not given to the profession until about the first of July 1908, and that our brief was filed within the time allowed by the rules after that date, and the court denied the motion of the defendant in error to dismiss, and gave him 30 days in which to file his brief; that was several months ago, and he has not filed his brief up to the present time, wholly disregarding the order of the court requiring him to file his brief within 30 days, and has remained silent until after the expiration

of the year, and then comes in and files this motion, which is wholly technical, and now asks that the cause be dismissed, upon the technical ground that service of process in this court has not been had upon all of the defendants in error. We think this a proper cause in which to invoke the equitable rule, that he who comes into equity, should come in with clean hands, and not himself be at fault. Counsel evidently discovered this defect after he had filed his first motion, and he has remained silent until after the expiration of the year before filing this motion. We do not believe that this is a case where the court will permit the defendant in error, who is at fault himself, to take advantage of such a technicality.

This case was brought in the court below on an agreed statement of facts, and is a case that comes clearly within the rule laid down by Mr. Chief Justice Burford in the case of The Consolidated Steel & Wire Company, et al. vs Burnham, et al. 58 Pac. Rep. 654, and should be disposed of on its merits in this court. The court in that case held that where a case is tried on an agreed statement of facts, the appellate court is as competent to consider such facts and apply the law as the trial court there being nothing to weigh as to the credibility of the witnesses, and the appellate court will determine the law on the facts as agreed upon, and may render such judgment as the trial court should have rendered. The defendant in error, Lewis Paullin, being in default himself, is in no position to take advantage of the fact that the other defendants in error were not served and have not appeared, and the granting of this cross-
123 motion will do no injustice to the other defendants in error. They can be served, and if they desire, file their brief in reply to the brief of plaintiff in error, and the case could then be heard on its merits. The defendant in error Lewis Paullin, having been properly served, both with a case made and a citation, and also properly served with a copy of the brief of the plaintiff in error, several months ago, and having been given a specific time by the court in which to file his brief, and having failed to do so, has no standing in this court, at this time, and can have no standing if this cross-motion is granted.

For these reasons the motion of the defendant in error, Lewis Paullin should be denied; but there is another reason in the second ground of the cross-motion which we think entitles us to have this cross-motion sustained, and that is,

II.

Under the section of the statute above qui-ted in the motion it will be seen that if this proceeding was dismissed that the plaintiffs in error, being infants, are not bound by the one year rule and may commence at any time up to the expiration of one year after reaching their majority. The records in this case show that both Oscar Lonan and Anna Lonan are infants of very tender years, being under the age of 12 years, and under this section of the statute, could bring this appeal any time between the rendition of the judgment and one year after reaching their majority, and

it would be a work of supererrogation to dismiss this case now and force these minors to file a new appeal, as they would have a right to do, when serving the defendants in error, not already served, would do nobody an injustice, and would reach the same result that a new appeal would reach.

The Supreme Court of Oklahoma has not passed on this question directly so far as we have been able to find, but in the two
124 cases that we have found where the question of dismissing an appeal was raised, because not taken in time, they have held that the appeal must be taken and perfected within one year except in cases of minors, and others under disability, and inferentially held, and that is bound to be the law, that minors might bring their appeal, not in one year, but at any time after the rendition of the judgment, and within one year after reaching their majority. See,

Doorley vs. Buford & George Mnfg. Co., 49 Pac. Rep., 926;
Hoffman et al. vs. Board of Commissioners of Pawnee County, 57 Pac. Rep., 167.

We think that under this statute it would be a great injustice to put these minors to the unnecessary expense of having this appeal dismissed and forcing them to take a new appeal, when justice can be done as well without injury to any one by allowing them to have the other defendants in error served at this time.

MAXEY & RUNYAN,
Attorneys for Plaintiff in Error.

125 In the Supreme Court of the State of Oklahoma.

HAGON JOHN, Guardian of Oscar Loman and Anna Loman, Minors, Plaintiff in Error,

vs.

LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT CO., a Corporation; Elmer Williams, Eli P. Williams, Chas. H. Williams, A. T. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants in Error.

Answer to Cross-Motion for Leave to Complete Service on Other Defendants in Error.

Comes now Lewis Paullin and files this his answer to the Cross-Motion of Hogan John, Guardian of Oscar Loman and Anna Loman, minors and says that said motion should not be granted, and that said motion shows no merit.

In reply to the first ground set up by said guardian in effect because defendant in error has not filed his brief in accordance with the rules of this Court etc., the said Lewis Paullin would call the Court's attention to the fact that this question of dismissing this appeal is a jurisdiction question and one which cannot be waived by laches or otherwise, but as an excuse for failure to file his brief the said Paullin would respectfully show to the Court that one of his attorneys to-wit:—V. B. Hayes in the office of Maxey & Runyon,

in the city of Muskogee soon after the said Maxey & Runyon has filed their brief had an agreement and understanding with Judge Maxey of said firm that the brief for the said Lewis Paullin could be filed after regular time and that the said Judge Maxey agreed at said time that when the brief was ready to be filed that he would sign a waiver as to time and agree that the same might be filed; that said brief would have been filed before this but for the delay occasioned by the motion to dismiss the appeal, the said Lewis Paullin having confidence in the justness of the motion and deeming it best to await the result of said motion before going to the expense of printing said brief. See affidavit of V. B. Hayes hereto attached as to such agreement. But as suggested above the
126 question of brief has no — being a jurisdictional question.

Wherefore we submit that there is no merit in the first contention, and the Court even tho inclined to do so would have now power or authority so to do it being a matter that is not within the discretion of the Court.

Attorneys for Hogan John say that this is a proper case in which to invoke the equitable rule, "He who seeks equity should do equity" we are willing to meet him on this proposition and say that we ought to be given as much time in which to file our brief as they took to file theirs.

We wish to call the Court's attention to the fact that counsel mis-state the facts when they say that this cause was tried on agreed statement of facts for such is not the case, and records in the case made will bear us out in this statement: there was an agreed statement as to a part of the facts in the case but there *was* several witnesses and a lot of records introduced on the trial which were not mentioned in the agreed statement.

As to the proposition that Lewis Paullin would not be injured by permitting the service to be made on the parties at this time, this might apply in every case but this is a matter with which the Court has nothing to do.

In reply to the second proposition that the plaintiffs in error being infants under the Section of the Statute quoted in said motion are not bound by the one year rule, we most emphatically deny that this provision has any application to the case at bar, and submit that the authorities cited do not support that contention. Hogan John the Guardian of these minors is the Plaintiff in error, and while he represents the interests of the minors yet the same degree of diligence in our judgment is required of him as of other parties to the suit, and if said minors loose by reason of his want of diligence or neglect of duty he and his bond are liable to said minors, but however this may be when a minor attempts to appeal his case the same rule as to procedure in so appealing applies as to any other party, and a minor can no more appeal a part of his case than can an adult, and this cause having been improperly
27 appealed and all the necessary parties not having been brought before this Court in proper time the same must be dismissed, and the Court in our judgment has no discretion in the matter and cannot say that they can change the rule in behalf of a minor even though it were granted that said minors could come back to this

Court by proper procedure, with that this Court at this time has nothing to do, and it will be soon[e]r enough to pass upon that question when it is properly presented to this Court when they seek to her-after come into this Court when they can at least claim that they have proceeded properly.

We submit that the cross-motion of plaintiffs in error is without merit and that the motion of the said Lewis Paullin to di-miss the appeal in this matter should be sustained and that said cause should be stri-ken from the records.

——— ———.

Attorneys for Paullin.

128 STATE OF OKLAHOMA.
Bryan County, ss:

Before the undersigned authority on this day personally appeared V. B. Hayes, who being duly sworn deposes and says that he is now and has been from the beginning of the case of Lewis Paullin vs. Choctaw-Chickasaw Investment Co. et als. one of the attorneys for the said Lewis Paullin, and that within a few days after receiving a copy of the brief of Maxey & Runyon, attorneys for Hogan John, that he was in Muskogee and in the Office of said Maxey & Runyon, he had a conversation with Judge Maxey of said firm in which the said Hayes stated to Judge Maxey that for fear that the brief in reply to the brief of Maxey and Runyon would not be ready in the required time, that he would like to have an understanding with reference to the same: and to this the said Maxey replied, that that would be satisfactory and that when said brief was prepared that he would gladly sign a waiver as to time and agree that same might be filed, and that the motion filed in said cause to dismiss for failure to file brief in time was done for the reason that he had concluded that plaintiff in error did not intend to prosecute his appeal and not for the purpose of taking any undue advantage.

——— ———.

Subscribed and sworn to before me on this the 7th day of April, A. D. 1909.

——— ———.
Notary Public.

My commission expores —.

[Endorsed:] 202. Hagon John, G'd'n, &c., Plt. in Error, vs. Louis Paullin et als., Dfts. in Error. Answer to Cross Motion. Copy. Filed Apr. 9, 1909. W. H. S. Campbell, Clerk.

129 And thereafter, to-wit, on the 12th day of May 1909, in the Supreme Court of Oklahoma, the following proceedings were had in said cause:

Supreme Court, May Term, 1909, May 12th 1909, Second Judicial Day.

#202.

HOGAN JOHN, Guardian, Plaintiff in Error,
vs.
LEWIS PAULLIN et al., Defendants in Error.

And now the above cause is this day submitted, and cross motion to consolidate withdrawn.

130 And thereafter to-wit: on the 14th day of September 1909, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, September Term, 1909, September 14th 1909, First Judicial Day.

#202.

HAGON JOHN, Guardian, Plaintiff in Error,
vs.
LEWIS PAULLIN et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the motion of defendant in error to dismiss the proceeding.

And the court having duly considered the same and being fully advised in the premises, finds that the above cause should be dismissed.

It is therefore ordered and adjudged by the court that the above cause, be, and the same is hereby dismissed.

Opinion by Hayes, J.

All the Justices concur.

131 Filed Sept. 14, 1909. W. H. L. Campbell, Clerk.

In the Supreme Court, State of Oklahoma.

No. 202.

HAGON JOHN, Guardian, Plaintiff in Error,
v.
LOUIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT CO., ELMER Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants in Error.

1. All parties to an action whose interests will be affected by a reversal of the judgment appealed from must be made parties to the appellate proceeding.

2. An appeal from a judgment against a guardian in an action prosecuted by him in his own name as guardian must be commenced within one year after the rendition of the judgment and all necessary parties to the proceeding must be brought into the appellate proceeding either by summons in error or by entry of general appearance within that period or the appeal will be dismissed.

(*Syllabus by the Court.*)

Error from the District Court of Bryan County.

Hon. Malcolm E. Rosser, Judge.

Maxey & Runyan, Attorneys for Plaintiff in Error.
Robert Crockett, V. B. Hayes, Attorneys for Defendants in Error.

Dismissed.

This proceeding is from a judgment of the district court of Bryan County in an action wherein defendant in error, Louis Paullin, was plaintiff, and the Choctaw-Chickasaw Investment Company, a corporation, Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas were defendants, and Hagon John, Guardian, was Intervenor.

132 Plaintiff, in his petition in the trial court, alleged for his cause of action that one Thomas Loman, a citizen by blood of the Choctaw Nation, on the 21st day of July, 1903, received as a part of his allotment of lands to which he is entitled as an Indian citizen, the east half of the northwest quarter and the west half of the northwest quarter of section 6, township 7 south, range 9 east. He alleges that on the 23rd day of January, 1906, the restrictions upon the power of the said Thomas Loman to alienate said lands were removed by the Secretary of the Interior and that on January 31st, 1906, Thomas Loman and wife, for a valuable consideration, conveyed the land to one S. A. Hawk, who, on the 17th day of January, 1907, by warranty deed conveyed the same to E. E. Fuller, and that E. E. Fuller conveyed said land, on the 23rd day of February, 1907, to plaintiff; that plaintiff is the owner in fee simple of said land and entitled to the possession thereof. He alleges that on July 21st, 1903, the date upon which the lands were allotted to Loman, Loman made and executed a lease thereon for a period of five years from date to the defendant, Choctaw-Chickasaw Investment Company; that on July 1st, 1904, Loman executed a second lease for a period of five years from date to defendant Elmer Williams, and on June 17th, 1905, he executed a third lease on the same property for the term of five years from date to defendant Eli P. Williams. He alleges that said three leases were in fact owned by one and the same person and were executed to three separate persons for the purpose of avoiding that provision of the law which prohibits an Indian citizen from leasing his land for a longer period than five years.

He alleges that the defendants Banks, Anderson Maddox, and Thomas are tenants of the aforesaid defendants and are now occupying the premises in controversy. He further alleges that at the time of the execution and delivery by Thomas Loman of the aforesaid three leases, Loman was totally without education, being un-
133 able to speak or write the English language, was weak-minded, ignorant, and easily influenced; that the defendants to whom said leases were executed knew these facts and took advantage of the ignorance, want of education, and incapacity of Loman to execute the contract, and by fraud, deceit, duress and undue influence, procured from him the lease contracts for an inadequate consideration. Plaintiff prays in his petition that the lease contracts be declared null and void and be cancelled as a cloud upon his title; that he be given judgment for possession of the land and for rents for the year 1907. Defendants filed their answer in which they admit some of the allegations of the plaintiff's complaint and deny others. Plaintiff in error, Hagon John, hereinafter designated as intervenor, made application to the court for leave, as Guardian of Oscar Loman and Annie Loman, minor children of Thomas Loman, deceased, to intervene in the action, which motion was by the court allowed. He thereupon filed his petition as the duly appointed, qualified and acting guardian of said minors, wherein he stated that he filed his petition of intervention as guardian of said minors, and for his cause of action against both plaintiff and defendant, says that the said Thomas Loman died on the 17th day of July, 1905, leaving him surviving as his sole heirs, said minor children; that Thomas Loman, before his death, executed the leases and deeds described in plaintiff's petition, but at the time of the execution of the same by him, he was wholly incompetent to understand the nature of the same and that each and all of said instruments were procured from him by the parties thereto by fraud, misrepresentation and undue influence over him, for a wholly inadequate consideration, and that the parties procuring said leases and deeds well knew at the time of the execution thereof that the grantor, Thomas Loman, was incompetent to execute the same.

134 Intervenor prayed that the leases executed by Loman to the Choctaw-Chickasaw Investment Company, Elmer Williams, and Eli P. Williams, and the deed executed by Loman to Hawk, and the deed executed by Hawk to Fuller, and the deed executed by Fuller to plaintiff, be cancelled as a cloud upon petitioner's title, and for general and special relief. The trial court found for plaintiff as against the intervenor, and dismissed intervenor's petition and found in favor of defendant Eli P. Williams as to the lease executed by Loman to him, holding that the same was a valid lease and in full force and effect, and rendered judgment decreeing that intervenor take nothing by his interplea and that same be dismissed, and that plaintiff's prayer for the cancellation of the lease from Loman to Eli P. Williams be refused and denied, but that he have judgment against Eli P. Williams for the sum of $25.00 as the amount of rent due under said lease for the year 1907.

Opinion of the Court by

HAYES, *J.*

Intervenor filed his petition in error in this court and plaintiff, as one of the defendants in error entered his general appearance within one year after the rendition of judgment in the lower court, but no summons in error was issued and served upon any of the defendants, nor did any of them enter a general appearance in this court within one year from the rendition of the judgment. Defendant in error, plaintiff below, now moves the court to dismiss the proceeding upon the ground that all the necessary parties had not been brought into this court by service of summons in error or by entry of general appearance within one year after the rendition of the judgment. In reply to this motion, plaintiff in error insists, first, that none of the defendants in the lower court are necessary parties, and second, that if any of them are necessary parties,
135 by reason of section 4748 of Wilson's Revised and Annotated Statutes, which provides that in case a person entitled to a proceeding in error be an infant, such proceeding shall be commenced within one year after rendition of judgment exclusive of the time of such disability, the time in which to bring a proceeding in error has not yet expired, since his wards have not yet attained their majority, and that he should be permitted at this time to have summons in error issued and served upon the necessary parties.

In consideration of his first contention, it will be unnecessary for us to determine whether all of the defendants in the lower court are necessary parties to this proceeding, for, if any one of them is a necessary party to this proceeding, then the motion will have to be sustained. Strange, et al. v. Crismon, 98 Pac. 937. In County Commissioners v. Harvey, et al., 5 Okla. 168, it is held that all persons who are parties to a proceeding in the trial court and whose interest will be affected by reversal of the judgment on appeal must be brought into the appellate proceeding. The judgment of the trial court in the case at bar declares the lease contract of Eli P. Williams to be a valid contract and that defendant in error, Paullin, by virtue of his being the owner of the fee simple title to the land, under a warranty deed from the grantees of Loman, is entitled to the rents under such contract and awards him judgment against Eli P. Williams for the sum of $25.00 as rents for the year 1907. Eli P. Williams has not appealed from this judgment and, as between him and defendant in error, Paullin, it has become final.
136 If, on consideration of this appeal on its merits, it should be found that the judgment of the trial court should be reversed and the intervenor's plea of intervention should be sustained, then intervenor would be entitled to collect the rents under said contract and such reversal of the judgment would prejudicially affect the rights of Eli P. Williams, and he is therefore a necessary party to this proceeding.

Intervenor's second contention is also without merit. Section 4748 of Wilson's Revised and Annotated Statutes provdes that all pro-

ceedings to reverse, vacate or modify a judgment or final order shall be commenced within one year after the rendition of the judgment or the making of the final order complained of except in cases where the person entitled to such proceeding may be an infant, a person of unsound mind, or imprisoned, in which event, such proceeding may be commenced within one year after the rendition of judgment exclusive of the time of such disability. The second provision of this section does not include guardians. The plea of intervention in this case was not filed by intervenor's ward. They never became parties to this action in the lower court and have never become parties to the proceeding in this court. Intervenor filed his plea of intervention in the lower court as guardian of said wards. He stated in his petition that he filed same as guardian of said minor children, but this statement does not make the minors parties to the action. Gorham v. Gorham, 3 Barb. Ch. 24; West v. West, 90 Ala. 458. The proceeding in the trial court was prosecuted by the intervenor, plaintiff in error here, in his own name as guardian, and this proceeding is brought in the same manner. Had the minors been parties to the action in the lower court represented by their next friend or guardian ad litem, the provision of the statute relied upon by intervenor would apply and they would have one year after the removal of their disability in which to prosecute a proceeding in error.

137 Moss, et al., v. Hall, 79 Ky. 49; Ridgley v. Bennett, et al. (Tenn.) 13 Lea, 206; Vardemark, et al., v. Wilkinson, 147 Ind. 56. But this provision of the statute does not extend to suits prosecuted by the guardian in his own name and the proceeding in error in this action is controlled by the first provision of said section 4748 and must be commenced within one year after the rendition of judgment and all necessary parties to the proceeding must be brought into the appellate proceeding either by summons in error or by entry of general appearance within that period. Strange, et al., v. Crimson, (Okla.) 98 Pac. 937.

The question whether a guardian may, in his own name, prosecute an action to remove a cloud from the title of his ward's real estate by an independent suit or by plea of intervention, as has been attempted to be done in the case at bar, is not presented by the motion before us or by the briefs filed by counsel, and upon that question we express *no* opinion.

Assuming for the purpose of this motion to dismiss, without deciding, that the guardian has such power, this proceeding must be dismissed for the reasons previously stated.

Kane, C. J. Williams, Dunn, Turner, JJ., concur.

138 In the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a

full, true and correct copy of the opinion of the Supreme Court, dismissing the appeal, in the case of Hagon John, Guardian, Plaintiff in Error, vs. Louis Paullin, et als., No. 202, which was filed in this office September 14th 1909, the original of which remains on file in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said Supreme Court this April 20th 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL.
Clerk Supreme Court.
By REUEL HASKELL, Jr., *Deputy.*

1381½ In the Supreme Court of the State of Oklahoma.

No. 202.

HAGON JOHN, Guardian, Plaintiff in Error,
vs.
LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT CO., ELMER WILLIAMS, ELI P. WILLIAMS, CHARLES H. WILLIAMS, A. P. BANKS, TOM ANDERSON, —— MADDOX, and —— THOMAS, Defendants in Error.

Petition for Rehearing.

Comes now Hagon John, guardian of Oscar Lonman and Annie Lonman, minors, and petitions the Court for a re-hearing in the above entitled cause, for the following reasons, to-wit:

1st.

That said decision is based upon the statute requiring that appeals and writs of error must be sued out and perfected within one year from the date of the judgment. On the motion to dismiss, we called the Court's attention to section 4748 of Wilson's Digest providing that in case a person entitled to a proceeding in error be an infant, such proceeding shall be commenced within one year after rendition of judgment, exclusive of the time of such disability, and insisted that the failure to bring in the other parties within a year was cured by reason of that statute, the plaintiffs in error being infants.

The Court, in its opinion dismissing the case, refers to that statute, but says that it does not apply to suits brought by guardians, as the bill in intervention in this case was not filed by intervenor's
1382 wards, and they never became parties, and therefore did not come within the provision of the statute giving infants one year after reaching their majority to perfect their appeal.

This suit was brought by Hagon John, guardian of Oscar and Annie Lonman, and not by Hagon John as an individual. By a reference to the plea of intervention, which is found on pages 23 and 24 of the transcript, it will be observed in the prayer of the petition

that Hagon John was seeking to have the conveyances in controversy in this suit set aside for the benefit of his wards. The prayer of said petition is as follows:

"The premises considered, your petitioner prays that the leases executed by said Thomas Loman to the defendants, Choctaw, Chickasaw Investment Company, Elmer Williams, Eli Williams, and the deeds executed by the said Thomas Loman to L. A. Hawk, and by L. A. Hawk to E. E. Fuller, and by E. E. Fuller to Lewis Paullin, the plaintiffs be cancelled, set aside, and held for naught, as a cloud upon your petitioner's title, and that such other and further orders be made in the premises as will fully protect the rights of these intervenors."

The language of this petition may not be as explicit as it might be, and the petition itself may not be inartificially drawn, but the sense of the petition is that Hagon John is seeking to set aside conveyances on land which he claims belongs to his ward.

The statute which seems to have been overlooked by the Court is section 1998 of the General Statutes of Oklahoma, 1908, and reads as follows:

140 "Executor-Trustee-Plaintiff. An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

The plaintiff in error, Hagon John, proceeded under this section in filing his interplea.

This section of the statute, being section 4226 of Wilson's Digest, was construed by the Supreme Court of Oklahoma, in the case of McColgan et al. v. Territory et al., 49 Pac., 1018; and we think that if the Court's attention had been called to this decision, the section of the statute above referred to, that it would have reached a different conclusion, as we think under this statute and decision Hagon John had the right to bring the action in the manner that it was brought.

For as much as it appears that this section of the statute and this decision were not called to the Court's attention, and were overlooked by the Court in preparing its opinion, the plaintiff in error prays for a rehearing in this cause to the end that the case may be heard on its merits.

Respectfully submitted,

N. R. MAXEY,
Attorneys for Plaintiff in Error.

141 Endorsed: No. 202. Hagon John, Gdn., vs. Lewis Paullin et al. Petition for rehearing. No. 202. Hagon John, guardian, v. Lewis Paullin et al. Petition for Rehearing. Filed Sept. 27, 1909. W. H. L. Campbell, clerk. Overruled.

1411/2 In the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and correct copy of the original petition for rehearing of Plaintiff in Error in the case of Hagon John Guardian, Plaintiff in Error vs. Lewis Paullin, et als, Defendants in Error, filed September 27th 1909, as the same remains on file in my office.

In Witness Whereof, I hereto se my hand and affix the seal of said Supreme Court, this April 29th 1911.

[Seal Supreme Court, State of Oklahoma,]

W. H. L. CAMPBELL,
Clerk Supreme Court.
By REUEL HASKELL, Jr.,
Deputy.

142 In the Supreme Court of the State of Oklahoma.

HAGON JOHN, Plaintiff,
vs.
LEWIS PAULLIN et al., Defendants.

To the Hon. Chief Justice and Justices of the Supreme Court of the State of Oklahoma:

We beg your indulgence to submit a few observations and call your attention to some cases that we think have a bearing on the motion for rehearing in this cause.

Since filing our petition for a rehearing, we have examined the case of the St. Louis & San Francis Railway Company vs. Cundeiff, recently decided by the United States Circuit Court of Appeals, for the 8th Circuit, and reported in the advance sheets of the Federal Reporter, of date September 23, 1909, at page 319. In this case the court holds that the procedure of the State of Arkansas governs in all cases brought prior to statehood, and that the pleading, practice and procedure follows the case to its final determination. If this rule should be followed by this court, then a citation in this case was not necessary to be issued and served on any of the defendants. This case was brought prior to statehood, on the equity side of the docket, and under section 1270 of Mansfield's Digest, the appeal having been taken in open court, no citation was necessary. Section 1270 is as follows:

143 "Unless the appeal is granted by the inferior court or the appellee enters his appearance in the Supreme Court he shall be summoned actually or constructively as provided by law for the service of summons, to appear and answer the appeal or writ of error."

This practice prevailed in the United States Court of Appeals for the 8th Circuit, and also in the United States Court of Appeals for the Indian Territory, prior to statehood. The appeal in this case was taken in open court, as will appear by the record.

If, on the other hand, this court should determine that it will not follow the rule laid down in the case from the United States Court of Appeals above cited, then we desire to call the court's attention to the following cases:

Waldrip, Guardian, vs. Tulley, 48, Ark., 297;
Rankin vs. Schofield, 70th, Ark., 83;
Same case, 66 S. W. Rep., 197.

These two cases discuss the status and relation of a Guardian and his ward, and we think are applicable to the case at bar.

We also desire to call the court's attention to the following cases from the State of Kansas, construing the section in our petition for rehearing:

Burkitt vs. Cogan, 26, Kans. 109;
Schem vs. Schem, 61 Kans. 643.

In the case reported in 26, Kans., the opinion was rendered by Justice Brewer, and construes the section of the Kansas Statute which is the same statute as quoted in our petition for rehearing. Under the rule in that case, we very much fear that if this court should adhere to its former opinion that these minors will be forever precluded by the judgment of the court below, and they certainly should have a day in court, either through their guardian, or within the statutory limitation after they come of age.

144 We also desire to call the court's attention to the fact that since the filing of the petition for rehearing all of the defendants have entered their appearance, and waived the issuing and service of citation on them as required by law.

We have called the court's attention to these authorities, as we know it is the desire of the court to reach a conclusion that is correct, and not do these minors an injury that may result fatally to them in the future.

The cases cited by the court in its opinion in this case, have been examined by us, and with all due respect we submit that the cases were under different statutes than our own, and, under our view, our statute is entitled to a different construction than that placed on the Alabama Statute and the New York Statute.

Respectfully submitted.

N. B. MAXEY,
Att'y for Hogan John, Def'n.

145 Indorsed on the back in letters and Figures as follows to wit: No. 202. Hagon John, Plaintiff, vs. Lewis Paullin et al., Defendants. Filed Oct. 8, 1909. W. H. L. Campbell, Clerk.

145½ In the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and correct copy of the original Amendment to the Application for Rehearing in the case of Hagon John, Guardian, Plaintiff in Error, vs. Lewis Paullin, et als., Defendants in Error, No. 202, as the same remains on file in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said Court this April 20th, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court.
By REUEL HASKELL, JR., *Deputy.*

146 In the Supreme Court of the State of Oklahoma.

No. 202.

HAGON JOHN, Guardian, Plaintiff in Error,
v.
LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT CO., ELMER Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants in Error.

Waiver of Citation and Appearance Entered.

Comes now the Choctaw-Chickasaw Investment Co., Elmer Williams, Eli P. Williams, and Charles H. Williams, defendants in error, in their own proper person, and also by Crook & Kyle, their attorneys, in the above entitled cause, and waive the fact that citation was not issued and served on them in this cause, and waive in writing the issuing and serving of summons on above defendants in error, and now, they in their own behalf and through their attorneys, enter their general appearance, and ask the Court to decide this case on its merits.

THE CHOCTAW-CHICKASAW
INVESTMENT CO.,
By ELI P. WILLIAMS, *Secretary.*
ELMER WILLIAMS,
CHARLES H. WILLIAMS,
ELI P. WILLIAMS,
CROOK & KYLE,
Att'ys of Record for Above-named Defendants.

CHOCTAW-CHICKASAW INVESTMENT CO.,
By CROOK & KYLE, *Att'ys.*
ELMER WILLIAMS,
By CROOK & KYLE, *Att'ys.*
CHARLES H. WILLIAMS,
By CROOK & KYLE, *Att'ys.*
ELI P. WILLIAMS,
By CROOK & KYLE, *Att'ys.*

Endorsed: No. 202. In the Supreme Court of the State of Oklahoma. Hagon John, Guardian, Plaintiff in Error, vs. Louis Paullin, Choctaw-Chickasaw Investment Co., Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants in Error.—Waiver of Citation and Appearance entered by Defendants, Eli P. Williams, and Charles H. Williams, Choctaw-Chickasaw Investment Co., Elmer Williams. (Filed October 5, 1909. W. H. L. Campbell, Clerk.)

146½ I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and complete copy of the waiver of citation and appearance entered in case No. 202, Hagon John, Guardian, v. Lewis Paullin, et al., as the same remains on file and of record in my office.

In witness whereof I hereunto set my hand and affix the seal of said court, at Oklahoma City, this the 24th day of July, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

147 In the Supreme Court of the State of Oklahoma.

No. 202.

HAGON JOHN, Guardian, Plaintiff in Error,
v.
LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT CO., ELMER WILLIAMS, ELI P. WILLIAMS, CHARLES H. WILLIAMS, A. P. BANKS, TOM ANDERSON, —— MADDOX, and —— THOMAS, Defendants in Error.

Waiver of Citation and Appearance Entered.

Comes now A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, by their attorneys, Crook & Kyle, in the above entitled cause, and waive the fact that citation was not issued and served upon them in this cause, and waive in writing the issuing and serving of summonses, and enter their general appearance through their attorneys, and ask the Court to decide this case on its merits.

It is contended, however, that the above parties are not necessary parties, under the law, in this appeal, for the reason that there was no judgment of any kind or character entered for or against them, or either one of them in this cause in the Court below.

A. P. BANKS,
By CROOK & KYLE, *Att'ys.*
TOM ANDERSON,
By CROOK & KYLE, *Att'ys.*
—— MADDOX,
By CROOK & KYLE, *Att'ys.*
—— THOMAS,
By CROOK & KYLE, *Att'ys.*
CROOK & KYLE,
Att'ys of Record for Above-named Defendants.

Endorsed: No. 202. In the Supreme Court of the State of Oklahoma. Hagon John, Guardian, Plaintiff in Error, vs. Louis Paullin, Choctaw-Chickasaw Investment Co., Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants in Error. Waiver of Citation and Appearance Entered by Defendants, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas. (Filed October 5, 1909. W. H. L. Campbell, Clerk.)

147½ I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and complete copy of the Waiver of Citation and Appearance Entered in case No. 202, Hagon John, Guardian, v. Lewis Paullin, et al., as the same remains on file and of record in my office.

In witness whereof I hereunto set my hand and affix the seal of said court, at Oklahoma City, this the 24th day of July, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

148 March Term, 1906.

TUESDAY, *April* 10, 1906.

Court met pursuant to adjournment. Present and presiding, Honorable Thos. C. Humphry, Judge. Also present, E. J. Fannin, Clerk; Geo. K. Pritchard, Marshall.

Whereupon the following proceedings were had, to-wit:

In Re GUARDIANSHIP OF OSCAR LOMAN & ANNIE LOMAN, Minors.

No. 1745.

On this day is presented in open court the petition and bond of Hagan John to be appointed guardian herein, and the Court being well and sufficiently advised in the premises both approve said bond, and appoint the said Hagan John guardian of the person and estate of Oscar Loman and Guardian of the person and estate of Annie Loman, and it is further ordered that Guardian institute the proper suit to recover property of said minors.

Whereupon Court adjourned until Monday July 30, 1906.

THOMAS C. HUMPHRY,
United States Judge.

STATE OF OKLAHOMA,
Pushmatah County:

I, L. P. Davenport, Judge of the County Court in and for the County and State aforesaid, do hereby certify that the above and foregoing instrument is a full, true and correct copy of the order

of Court in said cause and is to be found in Probate Record 2, page 132, as the same now appears from the records of this office, and I further certify that I am the lawful custodian of said Records.

In testimony whereof, I hereunto set my hand and the seal of said Court at Antlers, Oklahoma, this 23rd day of October, 1909.

[SEAL.] L. P. DAVENPORT,
County Judge.

149 Endorsed: #202. Filed Dec. 6, 1909. W. H. L. Campbell, Clerk.

149½ In the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and correct copy of the Guardianship of Hagon John, in the case of Hagon John, Guardian, Plaintiff in error vs. Lewis Paullin, et als., Defendants in Error, No. 202, as the same remains on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court this April 20th 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court.
By RUEL HASKELL, JR.,
Deputy.

150 Supreme Court, January Term, 1910, January 11th, 1910. First Judicial Day.

#202.

HAGON JOHN, Plaintiff in Error.
vs.
LEWIS PAULLIN et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the petition for rehearing filed herein.

And the court having considered the same, and being fully advised in the premises, finds: that the petition for a rehearing in the above cause should be denied.

It is therefore ordered and adjudged by the court that the petition for a rehearing in the above cause be, and the same is hereby denied.

Opinion by Hayes, J. All the Justices concur.

I, W. H. L. Campbell, Clerk of the Supreme Court, of the State of Oklahoma, do hereby certify that the above and foregoing is a full, true and correct copy of the order of court denying the petition for a rehearing in the above entitled cause as the same remains of record in my office.

In witness whereof, I hereto st my hand and affix the seal of said court this 29th day of May 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court.
By REUEL HASKELL, Jr.,
Deputy.

151 In the Supreme Court, State of Oklahoma.

No. 202.

Filed Jan. 11, 1910. W. H. L. Campbell, Clerk.

HAGON JOHN, Plaintiff in Error,
v.
LEWIS PAULLIN et al., Defendant- in Error.

Opinion on Rehearing.

HAYES, *J.:*

Upon the filing herein by plaintiff in error of a petition for rehearing, Eli P. Williams, and other defendants who were never served with summons in error, filed on the 15th day of October, 1909, their waiver of issuance of summons in error and service thereof and entered their general appearance and asked that the cause be decided upon its merits. The judgment of the trial court from which the appeal is taken was rendered on the 13th day of January, 1908. More than one year has elapsed after the rendition of that judgment before these defendants attempted to enter an appearance by waiver of issuance and service of summons. That they cannot now by this method confer jurisdiction upon the court has been settled in Weed v. Gates, 15 Okla. 602, wherein the court said:

"The statute fixes the time in which a party may appeal from a final order or judgment of a court of record. After that time expires, if no appeal has been taken in conformity with the statutes, the judgment of the lower court becomes final, and the appellate court has no power thereafter to review such judgment, even if all the parties expressly agree that it may do so. And the appeal must be taken as to all of the necessary parties within the prescribed time."

152 All other matters presented by the petition for rehearing were considered by the court on the original hearing and

no good reason has been advanced why the conclusions reached on that hearing should be reversed.

The petition for rehearing is denied.

Kane, C. J., Williams, Dunn, Turner, JJ., concur.

153 In the Supreme Court of the State of Oklahoma.

UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and correct copy of the original opinion of the Supreme Court on Rehearing, in the case of Hagon John, Guardian, Plaintiff in Error, vs. Lewis Paullin et als., Defendants in Error, filed January 11th 1910, denying petition for rehearing, in said cause, as the same remains on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said Supreme Court, this April 20th 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL.
Clerk Supreme Court.
By REUEL HASKELL, JR.,
Deputy.

154 In the Supreme Court of the State of Oklahoma.

Certificate.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 152 pages, numbered from one to 152, both inclusive, are a full, true and complete transcript of the record and all proceedings in the cause of Hogan John, Guardian of Oscar Loman and Anna Loman, Minors, Plaintiffs in error, vs. Lewis Paullin and Choctaw-Chickasaw Investment Company, a Corporation, Elmer Williams, Eli P. Williams, and Chas. H. Williams, A. T. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants in error, as the same remain on file and of record in my office.

In witness whereof, I hereto set my hand and affix the seal of said court, at Oklahoma City, this 18th day of August, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL.
Clerk Supreme Court of Oklahoma.
By JESSIE PARDOE, *Deputy.*

155 UNITED STATES OF AMERICA, *ss:*

To Lewis Paullin, Choctaw Chickasaw Investment Co., a Corporation; Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Oklahoma wherein Hagon John, Guardian of Oscar and Annie Loman, Minors, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this 4th day of September, in the year of our Lord one thousand nine hundred and eleven.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

156 On this 22nd day of September, in the year of our Lord one thousand nine hundred and eleven, personally appeared before me, the subscriber, W. T. Field, Marshal of the Supreme Court of the State of Oklahoma, and makes oath that he delivered a true copy of the within citation to

Robert Crockett Att'y, Durant, Oklahoma,
Utterback & Hayes " " "
Crook & Kyle " " "

Sworn to and subscribed the 22 day of September, A. D. 1911.

JESSIE PARDOE,
Deputy Clerk Supreme Ct., Okla.

I served this citation on the above persons in Durant, Okla., Sept. 21st, 1911.

W. T. FIELD,
Marshal of the Supreme Court of the State of Oklahoma.

Costs.

Mileage—Oklahoma City to Durant and return, 300 m. @ 10¢	$30.00
Serving papers and making return	1.50
Total	$31.50

Filed Sep. 22, 1911. W. H. L. Campbell, Clerk.

157 UNITED STATES OF AMERICA,
State of Oklahoma:

HAGON JOHN, Guardian of Oscar and Annie Loman, Minors, Plaintiff in Error,

vs.

LEWIS PAULLIN, CHOCTAW, CHICKASAW INVESTMENT CO., a Corporation; Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants in Error.

Petition for Writ of Error.

To the Honorable William R. Day, Justice of the Supreme Court of the United States:

The petition of Hagon John, Guardian of Oscar Loman and Annie Loman, Minors, respectfully shows that on the fourteenth day of September, A. D. 1909, the Supreme Court of the State of Oklahoma rendered a final judgment against your petitioner, in a certain cause wherein your petitioner was plaintiff in error and Lewis Paullin, Choctaw Chickasaw Investment Co., a corporation, Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, were defendants in error, dismissing plaintiff's appeal, as will appear by reference to the record of the proceedings in said cause which is herewith submitted, and that said court is the highest court of said State in which a decision in said suit could be had.

158 And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under Section 709 of the Revised Statutes of the United States, because he was denied the right of appeal in said cause, which was pending in the United States District Court of Indian Territory before that Territory became part of the State of Oklahoma, from a final decree of the District Court of Bryan County, Oklahoma, to the Supreme Court of Oklahoma, which he had taken and perfected in accordance with Sections 1266, 1267 and 1270 of Mansfield's Digest of the laws of Arkansas, made applicable to Indian Territory by Section 11 of the Act of Congress approved March 1, 1895 (28 Statutes at Large 698), and retained in force when Indian Territory became part of the State of Oklahoma by Section 20 of the Act of Congress approved March 4, 1907 (34 Statutes at Large 1287) known as the Enabling Act. Said appeal was also taken and perfected within the time provided by the Act of Congress approved March 3, 1905 (33 Statutes at Large 1081). The appeal was dismissed upon the ground that citation had not been served on certain parties of record in the trial court. The appeal was taken and allowed in open court at the same term at which the decree was passed (Record, page 108) and case made was allowed, certified and signed in open court in the presence of all parties in the persons of their respective attorneys (Record page 109), whereby citation became

and was unnecessary. Prior to entry of final judgment by the Supreme Court of Oklahoma, all parties entered appearance in that court. (Record pages 146, 147).

He was denied the right to prosecute his suit as guardian of his wards Oscar Lonman and Annie Lonman, which right was claimed by him under the provisions of Section 1936 of Mansfield's Digest of the Laws of Arkansas, made applicable to Indian Territory by Section 31 of the Act of Congress approved May 2, 1890 (26
159 Stat. L. 94; 3 Federal Statutes Annotated 406), which Act of Congress was retained in force with respect to petitioner's suit, when Indian Territory became part of the State of Oklahoma, by section 20 of the Act of Congress approved March 4, 1907 (34 Statutes at Large 1287) known as the Enabling Act. Petitioner also claimed the right to prosecute said suit by virtue of the order of the United States Court for Indian Territory which appointed him guardian of said minors, and in its order so appointing him ordered him to institute suit.

Wherefore, your petitioner prays the allowance of the writ of error returnable into the Supreme Court of the United States and for citation, and your petitioner will ever pray.

HAGON JOHN,
Guardian of Oscar Lonman and Annie Lonman, Minors, Petitioner.
By EDWARD F. COLLADAY,
Attorney for Petitioner.

Let the writ of error issue as prayed.

WILLIAM R. DAY,
Justice U. S. Supreme Court.

Sept. 4, 1911.

160 [Endorsed:] Filed Sep. 11, 1911. W. H. Campbell, Clerk. Edward F. Colladay, Attorney and Counsellor at Law, Union Trust Building, Washington, D. C.

161 UNITED STATES OF AMERICA,
State of Oklahoma:

HAGON JOHN, Guardian of Oscar and Annie Lonman, Minors, Plaintiff in Error,
vs.
LEWIS PALLIN, CHOCTAW-CHICKASAW INVESTMENT CO., a Corporation; Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and, —— Thomas, Defendants in Error.

Assignment of Errors.

Now comes the said plaintiff in error, and respectfully submits that in the record, proceedings, decision, and final judgment of the

Supreme Court of the State of Oklahoma in the above entitled matter, there is manifest error in this, to wit:

1. The Supreme Court of the State of Oklahoma committed error in dismissing said cause.

2. The Supreme Court of the State of Oklahoma committed error in holding that it was necessary to serve all parties with citation upon appeal, when the appeal was allowed in open court at the same term at which the decree of the trial court was passed and the case made was allowed, certified, and signed in open court in the presence of all parties in the persons of their respective attorneys.

3. The Supreme Court of the State of Oklahoma committed error in refusing to recognize the waiver of citation and entry of appearance made by all parties to said cause who were not served with citation.

4. The Supreme Court of the State of Oklahoma com-
162 mitted error in holding that the statutes of Oklahoma governed the manner of perfecting the appeal in this cause, thereby ignoring the fact that this cause was instituted in the United States Court of Indian Territory before that Territory became a part of the State of Oklahoma, and by Section 20 of the Act of Congress approved March 4, 1907, known as the Enabling Act the laws applicable to Indian Territory governed the manner, of perfecting the appeal.

5. The Supreme Court of the State of Oklahoma committed error in holding that the petition of intervenor, now plaintiff in error was not properly drawn, in that it was presented by plaintiff in error as guardian of said minors and not in their own names, the said Supreme Court thereby ignoring the provisions of Section 4936 of Mansfield's Digest of the Laws of Arkansas made applicable to Indian Territory by Section 31 of the Act of Congress approved May 2, 1890, and retained in force with respect to this cause after Indian Territory became part of the State of Oklahoma by Section 20 of the Act of Congress approved March 4, 1907.

EDWARD F. COLLADAY,
Attorney for Plaintiff in Error.

163 [Endorsed:] Filed Sep. 11, 1911. W. H. L. Campbell, Clerk. Edward F. Colladay, Attorney and Counsellor at Law, Union Trust Building, Washington, D. C.

164 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Hagon John, Guardian of Oscar

and Annie Lonan, minors, and Lewis Paullin, Choctaw-Chickasaw Investment Co., a corporation, Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question
the construction of a clause of the Constitution, or of a treaty,
165 or statute of, or commission held under the United States,
and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Hagon John, Guardian of Oscar and Annie Lonan, minors, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the sixth day of September, in the year of our Lord one thousand nine hundred and eleven.

JAMES H. McKENNNEY,
Clerk of the Supreme Court
of the United States.

Allowed by
WILLIAM R. DAY,
Associate Justice of the Supreme
Court of the United States.

Sep. 4, 1911.

[Endorsed:] Filed Sep. 11, 1911. W. H. L. Campbell, Clerk.

166 Know all men by these presents, that we, Hagon John, guardian of Oscar Lonan and Annie Lonan, minors, as principal, and the United States Fidelity & Guaranty Co. of Baltimore, Md., as sureties are held and firmly bound unto Lewis Paullin, Choctaw, Chickasaw Investment Co. a corporation, Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, in the full and just sum of — dollars, to be paid to the said —— —— certain attorney, executors, administrators, or assigns: to which payment, well and truly

to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25 day of April, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Supreme Court of the State of Oklahoma in a suit depending in said Court, between said Hagon John, guardian of Oscar Loman and Annie Loman, minors, as plaintiff in error, and said Lewis Paullin, Choctaw Chickasaw Investment Co., a corporation, Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas as defendants in error, a judgment was rendered against the said Hagon John, guardian of Oscar Loman and Annie Loman, minors, dismissing the appeal of said Hagon John, Guardian, and the said Hagon John guardian as aforesaid having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Lewis Paullin, Choctaw, Chickasaw Investment Co., a corporation, Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox and —— Thomas citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Hagon John guardian of Oscar Loman and Annie Loman, minors shall prosecute his said writ of error to effect, and answer costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

His
HAGON X JOHN. [SEAL.]
mark.
Guardian of Oscar Loman and Annie Loman, Minors.

THE UNITED STATES FIDELITY
AND GUARANTEE CO. [SEAL.]
By FRANK J. ALEVIAN, *Its Agent.*

Sealed and delivered in presence of—

——— ———.

——— ———.

Approved by—
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

(Not a supersedeas.)

[Endorsed:] Filed Sep. 11, 1911. W. H. L. Campbell, Clerk.

Endorsed on cover: File No. 22,882. Oklahoma Supreme Court. Term No. 105. Hagon John, guardian of Oscar and Annie Loman, minors, plaintiffs in error, vs. Lewis Paullin, Choctaw Chickasaw Investment Company et al. Filed September 28th, 1911. File No. 22,882.

5

Office Supreme Court, U. S.
FILED.
MAR 25 1912
JAMES H. McKENNEY,
CLERK.

No 8~~43~~. 105

In the Supreme Court of the United States

HAGON JOHN, Guardian ect.

Plaintiff in Error.

VS

LEWIS PAULLIN, et als.

Defendants in Error.

BRIEF OF LEWIS PAULLIN

W. T. SPROWLS
V. B. HAYS
ROBT. CROCKETT
Attys. for Defendants in Error

PAULLIN BROS. PRINT

In the Supreme Court of the United States

Hagen John, Guardian of Oscar Loman and Annie Loman, Minors, Plaintiff in Error,

vs.

Lewis Paullin, Choctaw-Chickasaw Investment Company, a Corporation, Elmer Williams, Eli P. Williams, Chas. H. Williams, A. P. Banks, Tom Anderson, ...Maddox, and..... Thomas, Defendants in Error.

No. 806.

BRIEF OF LEWIS PAULLIN, DEFENDANT IN ERROR.

STATEMENT OF FACTS.

On the 4th day of September, A. D., 1911, a writ of error was prosecuted from a judgment of the Supreme Court of Oklahoma, in a case therein, styled John et al., v. Paullin et al.; and on the 6th day of November, A. D., 1911, the defendant in error, Lewis Paullin, filed in this Court his motion to dismiss said writ of error; said motion is in words and figures as follows, to-wit:

"IN THE SUPREME COURT OF THE UNITED STATES.

Hagon John, Guardian of Oscar Loman and Nannie Loman, Minors,

Plaintiffs in Error,

vs.

Lewis Paullin, Choctaw-Chickasaw Investment Company, a Corporation, Elmer Williams, Eli P. Williams, Charles H. Williams, A. F. Barks, Tom Anderson, ... Maddox, and ..... Thomas, Defendants in Error.

No.———

Motion to Dismiss.

To the Honorable Judges of the said Court:

Comes now your petitioner, Lewis Paullin, and would represent and show unto the Court that he is one of the defendants in error in the above entitled cause, and as such moves this Court to dismiss the writ of error issued herein on the 4th day of September, 1911, and for grounds of this motion would show the following facts:

That the writ of error herein was prosecuted from a judgment of the Supreme Court of the State of Oklahoma, at the January, 1910, term of said Court, wherein Hagon John, guardian of the said Oscar Loman and Nannie Loman, minors, was plaintiff in error, and your petitioner and his co-defendants herein were defendants in error, in which said judgment of said Supreme Court of Oklahoma it was adjudicated that the appeal of the said Hagon John, guardian, etc., plaintiff in error, had not been perfected in that Court within the time provided by the Statutes of the State of Oklahoma, that is within one year from the date of the rendition of the final judgment in the trial court; the opinion of the said Supreme Court of Oklahoma in the said case on re-hearing is reported in 106 Pacific, 838 and reads as follows

> "Upon the filing herein by plaintiff in error of a petition for re-hearing, Eli P. Williams, and other defendants, who were never served with summons in error, filed on the 15th day of October, 1909, their waiver of issuance of summons in error and service thereof, and entered their general appearance, and asked that the cause be decided upon its merits. The judgment of the trial Court, from which the appeal is taken, was rendered on the 13th day of January, 1908. More than one

year had elapsed after the rendition of that judgment before these defendants attempted to enter an appearance by waiver of issuance and service of summons. That they cannot now by this method confer jurisdiction upon the court has been settled in Wedd v. Gates, 15 Okla., 602, 82 Pac. 808, wherein the Court said:

"The Statute fixes the time in which a party may appeal from a final order of judgment of a court of record. After that time expires, if no appeal has been taken in conformity with the statutes, the judgment of the lower court becomes final, and the appellate court has no power thereafter to review such judgment, even if all the parties expressly agree that it may do so. And the appeal must be taken as to all of the necessary parties within the prescribed time'."

Wherefore, your petitioner alleges and avers that it manifestly appears from the said opinion and judgment of the said Supreme Court of Oklahoma that the same were based solely upon a Statute of the State of Oklahoma governing the manner in which appeals should be perfected in the Supreme Court of the said State, and being a question of practice in the courts of said State, did not in any way involve the determination of a federal question; hence this Court is without jurisdiction of this cause on writ of error.

The premises considered, your petitioner prays that the writ of error herein before issued, as stated, be dismissed, and petitioner have all other such relief to which he may be entitled, and he will ever pray, etc.

.....

.....

.....

Attorneys for Lewis Paullin."

ARGUMENT.

This motion to dismiss should be sustained upon the authority of Newman v. Gates, 204 U. S. 89; 27 Sup. Court Rep., 220; 51 L. Ed. 385.

The following excerpt is taken from the statement of facts by Mr. Justice White, showing the similarity of the facts of that case to those in the case at bar:

"After the entry of judgment and before the taking of an

6

105.

No. 8~~485~~.

Office Supreme Court, U. S.
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APR 22 1912
JAMES H. McKENNEY
CLERK

In the Supreme Court of the United States

HAGON JOHN, GUARDIAN OF OSCAR LOMAN AND ANNIE LOMAN, MINORS,
Plaintiffs in Error,

v.

LEWIS PAULLIN, ET AL,
Defendants in Error.

Brief of Plaintiffs in error in opposition to the motion of Lewis Paullin one of the defendants in error to dismiss this case

N. B. MAXEY,
Attorney for Plaintiffs in Error.

In the Supreme Court of the United States

HAGON JOHN, GUARDIAN OF OSCAR LOMAN AND ANNIE LOMAN, MINORS,

Plaintiff in Error

vs.

LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT COMPANY, A CORPORATION, ELMER WILLIAMS, ELI P. WILLIAMS, CHAS. H. WILLIAMS, A. P. BANKS, TOM ANDERSON, ... MADDOX, AND ..... THOMAS,

Defendants in Error.

No. 806

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR IN OPPOSITION TO THE MOTION TO DISMISS OF LEWIS PAULLIN, ONE OF THE DEFENDANTS IN ERROR.

Comes now Oscar Loman, Annie Loman and Hagon John, their guardian, plaintiffs in error, and ask that this honorable Court overrule the motion of Lewis Paullin to dismiss said writ of error on the following grounds:

FIRST.

The record in said case has not been printed, nor has the defendant in error printed any portion thereof in connection with his motion and brief and we submit that the practice in this honorable Court is that the moving party should print the record or such parts of it as are necessary to present his motion to the Court. This he has not done.

SECOND.

Lewis Paullin in support of his motion to dismiss this action, sets out a part of the opinion of the Oklahoma Supreme Court and from the part of said opinion so set out and also the argument of counsel, it is clear that the Supreme Court of Oklahoma applied the statutes of Oklahoma in deciding this case.

Our contention is that when the entire record in said case is printed and properly before this honorable Court, that the printed record will show on its face that this case arose under and is wholly controlled by a Federal statute and that the statutes of Oklahoma does not in any way apply to this case or the appeal thereof and the Oklahoma Supreme Court erred in applying said statutes of Oklahoma thereto.

The record in this case was submitted to Mr. Justice Day when the writ of error was allowed.

THIRD.

This Court in substance, held in Bank v. Insurance Co., 100 U. S. 43, that the Court will not decide a motion to dismiss before record is printed where there is any question about the facts upon which the motion rests. To

get a decision before printing record the motion papers must present the case in a way which will enable the Court to act intelligently without referring to the transcript on file.

The motion papers in the case at bar does not do this and there can be no doubt but there is a grave question about the facts on which the motion to dismiss this case rests.

Lewis Paullin contends in his motion to dismiss, that this case is based solely upon the statutes of Oklahoma governing the manner in which appeals should be perfected in the Supreme Court of said state.

The plaintiff in error, Hagon John, Guardian, on the other hand contends that this case and the appeal thereof to the Supreme Court of Oklahoma, is controlled by Federal law, and that the statutes of Oklahoma did not apply thereto and that the record, when printed, will sustain this contention, and that the record will show, when printed, that there is a question about the facts on which this motion to dismiss the writ in this case rests.

Respectfully submitted,

N. B. MAXEY,

Attorney for Plaintiffs in Error.

Office Supreme Court, U. S.
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JAMES D. MAHER
CLERK

No. 185.

In the

Supreme Court of the United States

October Term, 1913.

HAGON JOHN, Guardian of Oscar and Annie Leman, Minors, *Plaintiffs in Error,*

vs.

LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT COMPANY, et al.,
Defendants in Error.

In Error to the Supreme Court of the State of Oklahoma.

Brief of Plaintiffs in Error in Opposition to the Motion to Dismiss and Argument on the Merits.

NAPOLEON B. MAXEY,
Attorney for Plaintiffs in Error.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1913.

No. 105.

HAGON JOHN, Guardian of Oscar and Annie Loman, Minors, *Plaintiffs in Error,*

vs.

LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT COMPANY, et al.,
Defendants in Error.

STATEMENT

For the convenience of the court a copy of the pleadings and such documentary evidence as bears upon the issues in this case are printed in an appendix to this brief, pp. 49 to 84.

This is a suit brought by the defendant in error, Lewis Paullin, to recover possession and rents on the premises described in the Bill of Complaint and to cancel certain instruments and quiet title of said premises in the plaintiff below, Lewis Paullin.

The case was tried on the amended complaint in equity, Transcript 12-15, Appendix 1 to this brief. The land in controversy is the allotment other than his homestead of Thomas Loman, full-blood Choctaw Indian and a member of the Choctaw and Chickasaw Tribes of Indians. There is 99.6 acres of land in controversy and it is located within one mile of the City of Durant, Oklahoma. This land was allotted to Thomas Loman by the Commission to the Five Civilized Tribes under Act of Congress approved July 1, 1902, entitled, "An act to ratify and confirm an agreement with the Choctaw-Chickasaw Tribes of Indians and for other purposes" (32 Stat. at Large 641), and as shown on the face of the patent issued to said Thomas Loman (Transcript, 27-28, Appendix 2), it is subject to all of the provisions of said Act of Congress; said provisions are in part as follows:

> *Section 16.* "All lands allotted to members of said tribe except such land as is set aside to each for a homestead as herein provided, shall be inalienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years and the balance in five years in each case from date of patent; provided, that such lands shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw Tribal governments for less than its appraised value."

> *Section 68.* "No Act of Congress or treaty provision nor any provision of the Atoka Agree-

ment inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations."

Section 73 is in part as follows:

"This agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws."

This is the basis of the title of the plaintiffs in error, Oscar Loman and Annie Loman, who are the children of Thomas Loman, now deceased.

The appellee, Lewis Paullin, claims title to said land and the right to recover in this action under a warranty deed of Thomas Loman and Lillie Loman to S. A. Hawk of South McAlester, Indian Territory, dated January 31, 1906 (Transcript 37, Appendix 3), and a copy of said deed was attached to the amended complaint in equity of Lewis Paullin and marked "Exhibit C."

On the 17th day of January, 1906, Hawk conveyed said lands to E. E. Fuller and thereafter, on the 12th day of February, the said E. E. Fuller conveyed said land to Lewis Paullin, defendant in error. The deed from Thomas Loman to S. A. Hawk above referred to was made in pursuance of a certificate of the Secretary of the Interior purporting to remove the restrictions on the land in controversy (Transcript 33, Appendix 5).

On the 17th day of June, 1905, Thomas Loman executed a power of attorney to one of the defendants in error, Charles H. Williams, constituting him his true and lawful agent and attorney in fact with full power to lease, rent, sell and convey, and to do all things that it would be lawful for the said Thomas Loman to do if acting for himself. (For power of attorney see Transcript 30-31, Appendix 6.) Williams went into possession under this power of attorney immediately after the date thereof, and was in possession at the time of the institution of this suit.

After suit was filed by Paullin on the 28th day of March, 1907, in the United States Court for the Central District of Indian Territory, the plaintiff in error, Hagon John, guardian of Oscar and Annie Loman, moved the court to be permitted to intervene in said suit for and on behalf of said minors and filed his petition of intervention (Transcript 21-23, Appendix 7), and the case, so far as the plaintiff in error and the defendant in error, Lewis Paullin, are concerned, was tried on these pleadings above referred to and set out in the appendix.

It was the contention of the plaintiff on the trial that the Secretary of the Interior having removed the restrictions on alienation of said land by Thomas Loman, as contained in his deed to Hawk, that this gave Loman full power to alienate said land and that by his deed to Hawk and Hawk's deed to

Fuller and Fuller's deed to Paullin, defendant in error acquired a perfect title to said land.

It was the contention of the plaintiff in error, as guardian of Oscar and Annie Loman, that said land was not alienable when Loman executed the deed to Hawk on account of the restrictions against alienation contained in the patent to Loman from the Choctaw and Chickasaw Nations, and also on account of the restrictions against alienation contained in the agreement between the United States, the Choctaw and Chickasaw Nations, and all Choctaws and Chickasaws. That Congress had no power to pass the Act of April 21, 1904, removing the restrictions on said land, and said removal thereunder was void.

It was further contended that if said Act of Congress did remove the restrictions on said land, that Thomas Loman could not alienate said land because he had executed a power of attorney to Charles H. Williams, giving him full power to do all things that he (Thomas Loman) could lawfully do, and that said power of attorney never having been revoked, the said Thomas Loman was without power or authority to make a valid conveyance while said power of attorney was in full force and effect.

The trial court held against the intervenor, plaintiff in error, on both of these propositions, and decreed that the removal of the restrictions by the Secretary of the Interior gave Thomas Loman the

right to convey, notwithstanding the treaty agreement between the Choctaw-Chickasaw Tribe and the United States, and that if the power of attorney executed to Charles H. Williams was valid during the lifetime of Thomas Loman, it was terminated by his death, and notwithstanding the fact that Charles H. Williams was in possession under said power of attorney on the date of Loman's deed to Hawk and at the time of the institution of this suit, Thomas Loman conveyed a good title to Hawk and Hawk to Fuller and Fuller to Paullin, the defendant in error herein. Exceptions were saved to the ruling of the court during the trial and to the entering of its judgment and an appeal was prosecuted to the Supreme Court of Oklahoma. This case not having been tried before Oklahoma was admitted as a state, was, under the Enabling Act, transferred to the state courts to be tried in accordance with the terms of the Enabling Act and was tried in the District Court of Bryan County, Oklahoma. An appeal was prosecuted from the judgment of the District Court of Bryan County to the Supreme Court of Oklahoma, and upon a hearing of the cause in the Supreme Court it was dismissed on motion of the defendant in error for the reason that plaintiff in error had not complied with the Oklahoma Statute in prosecuting his appeal and for the further reason that the intervenor filed his plea of intervention in the lower court as guardian of said minor children, but this statement does not make the minors parties to the action, and that the minors were not properly be-

fore that court, as required by the Oklahoma Statute. (See judgment and opinion of court, Transcript 73 to 78, Appendix 8.)

Plaintiff in error filed a petition for a rehearing and afterwards by leave of the court filed an amendment to his petition in which he made the contention that this case, having arose in the courts of Indian Territory prior to statehood and being pending therein upon the admission of Oklahoma as a state, that under the terms of the Enabling Act the same procedure that was in force in the Indian Territory prior to statehood governing appeals followed the case all the way through, and that under the federal procedure in force in Indian Territory prior to statehood an appeal taken in open court, as this appeal was taken, did not require the issuance of citation or the service of same, and contended that under the federal procedure an appeal was properly taken and that the court was in error in holding that it was governed by the Oklahoma Statute governing an appeal. For petition for rehearing, amendment thereto, and argument thereon, see Transcript, 78 to 82, Appendix 9.

It will appear from the opinion of the Supreme Court of Oklahoma in overruling petition for rehearing that all of the defendants in error who had not been served or who had not entered their appearance, came in pending the petition for rehearing and entered their voluntary appearance.

Plaintiff in error, Hagon John, guardian of Oscar and Annie Loman, sued out a writ of error to this court which was allowed by Justice William R. Day on September 4, 1911, and transcript of the record duly filed in this court and the case docketed. Since the filing of the record in this court the defendant in error, Lewis Paullin, has filed a motion to dismiss the writ of error, but said motion has not been disposed of by the court, and will be argued by plaintiff in error in connection with his argument on the merits of the case.

The Supreme Court of Oklahoma not having passed on the merits of the case, plaintiff in error will point out such assignments of error filed with his appeal in the Supreme Court of Oklahoma, on the merits of the case, as he desires to urge in this court, and which is hereafter set out in his assignments of error.

The assignments of error relied on in this court are as follows:

ASSIGNMENT *of* ERRORS

In the Supreme Court of Oklahoma there were twelve assignments of error which will be found on pages 1-4 of Transcript, but we only desire to insist on errors Nos. 4, 6, 10 and 11, which are as follows:

IV.

"The court finds that on application to the Secretary of the Interior, the restrictions of the said Thomas Loman were removed and that said Loman sold the land to Hawk for a consideration, as appears in the record, of $1,500.00; that Hawk afterwards conveyed the land to Fuller for a consideration of $2,700.00, I believe, and that Fuller afterwards conveyed the land to the plaintiff, Mr. Paullin, for a consideration of $2,800.00. All these conveyances and the removal of the restrictions of Thomas Loman are in the record and the court finds that Paullin bought the land from Fuller without any notice of knowledge of any defect in the title or the incompetency of the allottee, and that therefore he has a good title; that the heirs of the allottee cannot attack him or his title because he is an innocent purchaser, with no knowledge of the competency or incompetency of the Indian, and for the further reason that the finding of the Secretary of the Interior as to the

removal of the restrictions was an adjudication that he was competent to sell or dispose of his surplus allotment."

VI.

"The court further finds that the power of attorney from Thomas Loman to Chas. H. Williams was revoked with the death of Thomas Loman, because at the time of the granting of the power of attorney Loman could not convey any interest in the land, and for the further reason that the consideration for an interest in the land, even if the allottee could have conveyed such an interest, was grossly and entirely inadequate."

X.

"That the said court erred in holding that the deed executed by Thomas Loman on the 31st day of January, 1906, to S. A. Hawk, and from S. A. Hawk to E. E. Fuller and from E. E. Fuller to Lewis Paullin, conveyed a perfect title to said Lewis Paullin, when the record shows that Chas. H. Williams was in possession at that time under a power of attorney executed by said Thomas Loman prior to the execution of said deed and that said power of attorney had not been revoked, set aside or canceled by any act of the said Thomas Loman. And for the further reason that plaintiff, in his petition or com-

plaint, nowhere asked to have said power of attorney set aside."

XI.

"The said court erred in not entering a decree in favor of the intervenor and against all of the defendants."

We also insist on the errors assigned in our petition in error and assignment of errors in this court which are found on page 91 of Transcript, and are as follows:

"1. The Supreme Court of the State of Oklahoma committed error in dismissing said cause.

2. The Supreme Court of the State of Oklahoma committed error in holding that it was necessary to serve all parties with citation upon appeal, when the appeal was allowed in open court at the same term at which the decree of the trial court was passed and the case-made was allowed, certified and signed in open court in the presence of all parties in the persons of their respective attorneys.

3. The Supreme Court of the State of Oklahoma committed error in refusing to recognize the waiver of citation and entry of appearance made by all parties to said cause who were not served with citation.

4. The Supreme Court of the State of Oklahoma committed error in holding that the Statutes of Oklahoma governed the manner of perfecting the appeal in this cause thereby ignoring the fact that this cause was instituted in the United States Court of Indian Territory before that territory became a part of the State of Oklahoma, and by section 20 of the Act of Congress approved March 4, 1907, known as the Enabling Act the laws applicable to Indian Territory governed the manner of perfecting the appeal.

5. The Supreme Court of the State of Oklahoma committed error in holding that the petition of intervenor, now plaintiff in error, was not properly drawn, in that it was presented by plaintiff in error as guardian of said minors and not in their own names, the said Supreme Court thereby ignoring the provisions of section 4936 of Mansfield's Digest of the Laws of Arkansas, made applicable to Indian Territory by section 31 of the Act of Congress approved May 2, 1890, and retained in force with respect to this cause after Indian Territory became part of the State of Oklahoma by section 20 of the Act of Congress approved March 4, 1907."

ARGUMENT OPPOSING MOTION TO DISMISS.

The first question presented in this case is the motion to dismiss filed November 6, 1911, in this court by Lewis Paullin, defendant in error.

Said motion to dismiss is to the jurisdiction of this court and the argument in support thereof proceeds upon the theory that the appeal in this case was controlled by the statutes of the State of Oklahoma governing the manner in which appeals should be perfected to the Supreme Court of said state.

Our contention is that the appeal in this case was not controlled by the Statutes of Oklahoma, but was controlled by the federal law in force in the Indian Territory before statehood, and the Supreme Court of Oklahoma in not applying said federal law in the appeal in this case denied the plaintiffs in error a federal right.

In support of our contention the following is submitted:

It is apparent from the judgment and opinion of the Supreme Court of Oklahoma (Transcript, 73 to 78, Appendix 8), that two points were controlling in deciding this case: *(1)* the sufficiency of the appeal; and, *(2)* the manner in which this suit was brought.

(1) The Sufficiency of the Appeal.

The appeal was treated by the Supreme Court of Oklahoma as depending wholly upon the Statutes of Oklahoma for its sufficiency and the Supreme Court erroneously dismissed the appeal in this case because no citation or summons was issued as required by the Statutes of Oklahoma. In this the court was in error, for this case had been pending in the courts of the Indian Territory for some time before that territory became a part of the State of Oklahoma, and for this reason was appealable under the federal law in force in Indian Territory before statehood and the sufficiency of the appeal thereunder was in no way controlled or affected by the Statutes of Oklahoma.

The federal law in force in Indian Territory before statehood and controlling the appeal in this case, is as follows:

> "*Act of Congress Approved March 3, 1905, 33 Stat. L. 1081, Section 12.*
>
> That hereafter all appeals and writs of error shall be taken from the United States Courts in the Indian Territory to the United States Court of Appeals in the Indian Territory, and from the United States Court of Appeals in the Indian Territory to the United States Circuit Court of Appeals for the Eighth Circuit in the same manner as is now provided for in cases taken by appeal or writ of error from the Circuit Courts of the United States to the Circuit Court of Appeals of the United States for the Eighth Circuit."

The manner of appeal in the Eighth Circuit (so far as citation is concerned) is the same as the Statute of Arkansas which was repealed by above act and is the same as in the United States Courts generally, and in said courts no citation is required when an appeal is taken in open court as the appeal was in the case at bar. The following is controlling on this point:

Taylor v. *Lessnitzer*, 220 U. S. 90.

In this case the court said:

> "When an appeal is taken in open court it does not need the formalities of ancient law to indicate that it was taken against all adverse interests. All are present in fact or in law and they have notice then and there. No citation is required. *Chicago & P. R. Co.* v. *Blair*, 100 U. S. 661, 25 L. ed 587; *Brockett* v. *Brockett*, 2 How. 238, 11 L. ed. 251."

The appeal in this case was taken in open court and at the term this case was tried and all the parties to the case were present by their attorneys of record which will appear from the following proceedings had in the trial court:

"*In the District Court of Bryan County, State of Oklahoma.—No. 916.—Lewis Paullin, Plaintiff, vs. Choctaw-Chickasaw Investment Company, et al., Defendants; Hagon John, Intervenor.*

Be it remembered, that on this 27th day of March, 1908, at the hour of 9 o'clock A. M., at the Court House in the City of Durant, in the County of Bryan and State of Oklahoma, the above and

foregoing case-made was presented to me, Malcom E. Rosser, Judge of the District Court of Bryan County, said state and before whom said cause was tried, to be settled and signed as the original case-made herein, as required by law, by the parties to said cause; and it appearing to me that said case-made has been duly made and served upon the plaintiff and other parties of interest within the time fixed by the order of the court, and in the time and manner and form as prescribed by law; and that all parties are present in the person of their respective attorneys of record and said plaintiff having waived the presentation of amendments to said case-made and the court being well and fully advised in the premises and the said case-made having been examined by me, is true and correct, and contains a true and correct statement and complete transcript of all the pleadings, motions, orders, evidence, findings, judgments and proceedings in said cause, I hereby allow, certify and sign the same as the true and correct case-made in said cause, and hereby order the clerk of said court to attest the same with his name and the seal of said court, and file the same of record, as provided by law.

Witness my hand, this 27th day of March, 1908.

(Seal) MALCOM E. ROSSER,

Judge of the District Court of Bryan County, Oklahoma.

Attest: W. R. COLLINS,

Clerk of the District Court of Bryan County, Okla." (Transcript 61-62.)

January 11, 1910, the Supreme Court of Oklahoma denied the petition for rehearing in this case.

July 12, 1910, the Supreme Court of Oklahoma decided the case of *Freeman* v. *Eldridge*, 110 Pac. 1057, and we quote the following therefrom: "Section 1 of the Schedule to the Constitution provides: 'No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken. * * *' This action was instituted in the District Court of Oklahoma County, Territory of Oklahoma, on the 4th day of April, 1905, and was pending, and undetermined, at the time of the admission of the state. This section of the schedule was construed by the United States Circuit Court of Appeals for the Eighth Circuit on May 11, 1909, in *St. Louis & S. F. R. Co.* v. *Condieff*, 171 Fed. 319, 96 C. C. A. 211, wherein it is said:

> ***'Construing all of these provisions together, we are of opinion that they do not change, and were not intended to change, the method of procedure in cases pending in the courts of Indian Territory and of the Territory of Oklahoma, but that the civil cases pending in the Indian Territory should, after statehood, continue under the law in force in the Indian Territory, and under that law no reply was required prior to statehood. We do not think that the provision of the Constitution (section 2, Schedule to Const.) relied upon by the railroad company so changes the situation as to make a reply necessary.'***

If by virtue of this section of the Schedule as to pending cases the existing procedure as in force

in the Indian Territory at the time of the erection of the state is to continue, and be applied to such case, the then existing legal rate of interest was intended to also continue and likewise apply. Construing section 1 of the Schedule in the light of the construction placed upon same by the Circuit Court of Appeals in the *Cundieff* case, we conclude that the action of the trial court was without error."

It will be observed that the Supreme Court of Oklahoma in the case of *Freeman* v. *Eldridge* followed the law as announced by the United States Circuit Court of Appeals for the Eighth Circuit in the case of *St. Louis & San Francisco Railway Company* v. *Cundieff*, and since the decision in the *Freeman* case above, the law is settled in Oklahoma that as to pending cases the procedure in force in the Indian Territory at the time of the erection of the state is to continue and be applied to such cases.

It will be remembered that the *Cundieff* case above is the case that was pointed out to the Supreme Court of Oklahoma in the amendment to the petition for rehearing as controlling the appeal in the case at bar, and it was suggested therein that if the rule in the *Cundieff* case should be followed, a citation in this case was not necessary to be issued. (Transcript, 80, 81, Appendix, 9.)

2. The Manner in Which This Suit Was Brought.

It will be remembered that the Supreme Court of Oklahoma, in dismissing the appeal in this case, applied the Statutes of Oklahoma, and the court said:

> "Intervenor filed his plea of intervention in the lower court as guardian of said wards. He stated in his petition that he filed same as guardian of said minor children, but this statement does not make the minors parties to the action. *Gorham* v. *Gorham*, 3 Barb. Ch. 24; *West* v. *West*, 90 Ala. 458. The proceedings in the trial court was prosecuted by the intervenor, plaintiff in error here, in his own name as guardian, and this proceeding is brought in the same manner. Had the minors been parties to the action in the lower court represented by their next friend or guardian *ad litem*, the provision of the statute relied upon by the intervenor would apply and they would have one year after the removal of their disability in which to prosecute a proceeding in error." (Transcript, 77; Appendix, 8.)

This case was pending before statehood, and the manner in which this suit was brought was not controlled by the Statutes of Oklahoma, but was wholly controlled by the Statutes of Arkansas which was put in force in the Indian Territory by an Act of Congress approved May 2nd, 1890 (26 Stat. L. 81).

Sections 4936, 4955 and 4957 of chapter 119 of said Statutes of Arkansas are as follows:

"*Sec. 4936.* An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or the state, or any officer thereof, or any person expressly authorized by the statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted."

"*Sec. 4955.* The action of an infant must be brought by his guardian or his next friend. Any person may bring the action of an infant as his next friend; but the court has power to dismiss it, if it is not for the benefit of the infant, or to substitute the guardian of the infant, or another person, as the next friend."

"*Sec. 4957.* The defense of an infant must be by his regular guardian, or by a guardian appointed to defend for him, where no regular guardian appears or where the court directs a defense by a guardian appointed for that purpose.

No judgment can be rendered against an infant until after a defense by a guardian."

Under above statute the Supreme Court of Arkansas held:

"An attorney *ad litem* should not be appointed for an infant. *Hodges* v. *Frazier*, 31 Ark. 58."

We submit that the manner in which this suit was brought was sufficient under the Statutes of Arkansas, quoted above, which were in force in the Indian Territory and were federal laws and controlled the appeal in this case, and that the minors

were parties to the action in the trial court and also in the Supreme Court of Oklahoma, and the Supreme Court committed error in dismissing this case and thereby denied the right of appeal secured to the plaintiffs in error under the federal laws in force in the Indian Territory which controlled this appeal, and thereby a federal right was denied plaintiffs in error.

Federal Right Presented to and Denied by the Supreme Court of Oklahoma

The following documents were filed in the original record in this court in this case and were not printed in the Transcript of the record:

"Certified copy of Brief of Lewis Paullin (a)
Certified copy of Rules of Supreme Court of Okla. adopted March 12, 1908... (b)
Certified copy of Brief for Hagon John (c)"

The rules of the Supreme Court of Oklahoma referred to above required that the printed briefs of plaintiff and defendant in error shall be filed in said court and the printed briefs in this case were filed as required by said rules.

In order that this court may know the nature of the federal questions presented to the Supreme Court of Oklahoma, and the manner they were presented to said court, we quote from the certified copies of briefs mentioned above.

From the certified copy of brief for Hagon John we quote as follows:

"I.

"One of our contentions in this suit is that the Secretary of the Interior had no authority under the law to remove the restrictions against alienation on the lands of Thomas Loman.

"The patent to Thomas Loman, among other things, states: (For copy of patent see Transcript, 27, 28, Appendix 2) That it was issued 'subject, however, to the provisions of the Act of Congress approved July 1, 1902 (32 Stat. 641)'. By the above provision the entire Act of Congress approved July 1, 1902, became a part of the patent to Thomas Loman just the same as if this Act of Congress had been written in full in his patent and this act provides how Thomas Loman could alienate his land, which is as follows:

> '*16.* All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead, as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years, in each case from date of patent; *provided*, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.'

Section 68 of this act is as follows:

> '*68.* No Act of Congress or treaty provision, nor any provision of the Atoka Agreement, inconsistent with this agreement, shall be in force in said Choctaw and Chickasaw Nations.'

" Under the above law Thomas Loman allotted the land in controversy in this suit and received his allotment certificate therefor which is dated July 21, 1903 (see pp. 26, 27, Transcript, for copy of allotment certificate), and also received his patent for said land which was approved by the Secretary, September 8, 1905.

" When we consider the fact that the entire Act of Congress approved July 1, 1902, was made a part of the patent to Thomas Loman and that section 68 of said law quoted above provided that no Act of Congress inconsistent with this agreement shall be in force in said Choctaw and Chickasaw Nations and this act nowhere provides that the Secretary of Interior can remove restriction, it don't seem just that this law could be changed to the great detriment of Thomas Loman; and the law passed by Congress which attempted to give the Secretary power to remove restriction on alienation was unjust and unconstitutional." * * * *

" The agreed statement of facts states (Transcript 15, 17, Appendix 4):

"That Charles H. Williams has rented this land and collected the rents therefor."

" The above establishes the fact that Charles H. Williams is in possession of said land under a power of attorney from Thomas Loman.

" This power of attorney had never been revoked, unless his death revoked it. See

Hunt v. *Rousmanier*, 8 Wheat. 174;

Jeffries, Administrator, v. *Mutual Life Ins. Co. of N. Y.*, 110 U. S. 305;

Guthrie v. *Wabash*, 40 Ills. 109;
Walker v. *Denison*, 86 Ills. 142;
Parke v. *Frank*, 75 Cal. 364;
Terwilliger v. *Ontario S. R. R. Co.*, 149 N. Y. 86;
Wassell v. *Rearidon*, 11 Ark. 706.

"The plaintiff does not ask in his complaint to have the court revoke or cancel this power of attorney; the law is settled beyond question that the pleadings settle the issues in a suit. See

Reynolds v. *Stockton*, 140 U. S. 254;
Board of Commissioners v. *Board of Commissioners*, 26 Kansas 181. (By BREWER.)

"Yet the court held that Loman's death revoked it, but at the same time held that Loman's deed to Hawk was good, notwithstanding the power of attorney was not revoked until his death. The court's holding is inconsistent. If the power of attorney was not revoked until Loman's death, then it is self-evident that Loman's deed to Hawk was void, for it was made before Loman's death and should have been canceled as a cloud upon intervenor's title and all other deeds and leases executed after the power of attorney should have been canceled."

We quote the following from the brief of defendant in error filed in said court:

"Brief of Lewis Paullin, Defendant in Error.

"We will discuss the questions raised by plaintiff in error, Hagon John, in the same order in which he discusses them.

I.

"The first question raised by plaintiff in error seems to us to be so trivial and so lacking in merit, that we feel constrained to apologize to the court for devoting any portion of this brief to an endeavor to refute it. Plaintiff in error argues that, because the patent which was issued to Thomas Loman recited that the same was 'issued subject to the provisions of the Act of Congress approved July 1, 1902 (32 Stat. U. S. 641)', the lands therein conveyed could be alienated by the allottee, Thomas Loman, only under and by virtue of the terms of the said act, which provides as follows:

(We omit sections 16 and 68 quoted herein as they are the same as sections 16 and 68 quoted above.)

"There is no force in this contention of the plaintiff in error. It is universally recognized 'that the power of Congress to legislate concerning Indians is absolute, and is superior to any pre-existing treaty or tribal constitution or law'."

Briefly, it is apparent from the foregoing that the protection of the restrictions against alienation of said land contained in the patent to Loman, and also the protection of the restrictions against alienation contained in the Act of Congress approved July 1, 1902 (32 Stat. L. 641), is invoked, and that the constitutionality of the law passed by Congress

which attempted to give the secretary power to remove the restrictions upon Loman was challenged.

Said law is the Act of Congress approved April 21, 1904 (33 Stats. 204).

For removal certificate see Transcript 33, Appendix 5.

Said Act of Congress is set out as above in said removal certificate which was filed in the trial court below, and is referred to in the findings of said trial court. (Transcript, 54.)

From the quotation above from brief of Hagon John, it is also apparent that it was insisted that under the power of attorney of Thomas Loman to Charles H. Williams (Transcript 30, 31, Appendix 6), that Loman had no power to alienate said land and that the power of attorney had never been revoked unless revoked by Loman's death. This would be of no benefit to defendants in error for the deed from Loman to Hawk on which appellee's title is rested was executed before Loman's death.

The trial court, in holding that the power of attorney of Loman to Williams was revoked, denied a federal right to appellants because said power of attorney was executed under a federal law in force in Indian Territory before statehood, and said law provided briefly that no letter of attorney shall be revoked but by the maker thereof, which revocation shall be in writing, acknowledged and recorded.

It was not claimed or contended in this case that said power of attorney was revoked as provided in said federal law.

In *Patton* v. *Brady*, 184 U. S. 608, the court said:

> "That a case arises under the Constitution of the United States when the right of either party depends on the validity of an Act of Congress is clear."

All of the federal rights asserted above were presented to the Supreme Court of Oklahoma long before said court rendered the judgment erroneously dismissing the appeal in this case, and the effect of said judgment was to deny the federal rights thus specially set up by the appellants.

Amendment to Petition for Rehearing.

October 8, 1909, by permission of the court, an amendment to the petition for rehearing was filed in this case, and we quote the following therefrom:

"Since filing our petition for a rehearing, we have examined the case of the *St. Louis & San Francisco Railway Company* v. *Cundiff*, recently decided by the United States Circuit Court of Appeals for the Eighth Circuit, and reported in the advance sheets of the Federal Reporter, of date September 23, 1909, at page 319. In this case the court holds that the procedure of the State of Arkansas governs in all cases brought prior to statehood, and that the pleadings, practice and procedure follows the case to its final determination. If this rule should be followed by this court, then a citation in this case was

not necessary to be issued and served on any of the defendants. This case was brought prior to statehood, on the equity side of the docket, and under section 1270 of Mansfield's Digest, the appeal having been taken in open court, no citation was necessary. Section 1270 is as follows:

> 'Unless the appeal is granted by the inferior court or the appellee enters his appearance in the Supreme Court he shall be summoned actually or constructively as provided by law for the service of summons, to appear and answer the appeal or writ of error.'

This practice prevailed in the United States Court of Appeals for the Eighth Circuit, and also in the United States Court of Apepals for the Indian Territory, prior to statehood. The appeal in this case was taken in open court, as will appear by the record."

It is apparent from the foregoing petition for a rehearing that the Supreme Court of Oklahoma was directed to the law as laid down in the *Cundiff* case as controlling the appeal in the case at bar, and the Supreme Court erred in not applying the federal law in force in Indian Territory before statehood in the appeal in this case as announced in *Cundiff* case.

The opinion of the Supreme Court of Oklahoma denying petition for rehearing, is as follows:

"*In the Supreme Court, State of Oklahoma.—No. 202.—Filed Jan. 11, 1910, W. H. L. Campbell, Clerk.—Hagon John, Plaintiff in Error* v. *Lewis Paullin et al., Defendants in Error.*

Opinion on Rehearing.

HAYES, J.:

Upon the filing herein by plaintiff in error of a petition for rehearing, Eli P. Williams, and other defendants who were never served with summons in error, filed on the 15th day of October, 1909, their waiver of issuance of summons in error and service thereof and entered their general appearance and asked that the cause be decided upon its merits. The judgment of the trial court from which the appeal is taken was rendered on the 13th day of January, 1908. More than one year has elapsed after the rendition of that judgment before these defendants attempted to enter an appearance by waiver of issuance and service of summons. That they cannot now by this method confer jurisdiction upon the court has been settled in *Weed* v. *Gates*, 15 Okla. 602, wherein the court said:

'The statute fixes the time in which a party may appeal from a final order or judgment of a court of record. After that time expires, if no appeal has been taken in conformity with the statutes, the judgment of the lower court becomes final, and the Appellate Court has no power thereafter to review such judgment, even if all the parties expressly agree that it may do so. And the appeal must be taken as to all of the necessary parties within the prescribed time.'

All other matters presented by the petition for rehearing were considered by the court on the original hearing and no good reason has been advanced why the conclusions reached on that hearing should be reversed.

The petition for rehearing is denied.

Kane, C. J., Williams, Dunn, Turner, J. J., concur." (Transcript, 86, 87.)

Briefly, in the above opinion denying a rehearing in this case, the Supreme Court of Oklahoma held that all the matters presented by the petition for rehearing were considered by the court and decided. The effect of this decision was, to decide the federal questions presented in the petition for rehearing (to-wit, the right to appeal this case under the federal law in force in the Indian Territory before statehood), against the contention of the appellants.

A federal question is raised in time when raised on a motion for rehearing in a State Supreme Court and decided.

In *McKay* v. *Kalyton*, 204 U. S. 463, the court said:

> "It is contended that we are without jurisdiction because no title, right, or immunity was specifically set up or claimed under any federal statute and denied. But, leaving aside for a moment all other considerations, it is plain that the defendant below set up a claim of immunity from suit in the state court under the laws of the United States, and that the right to the immunity so asserted under an Act or Acts of Congress was expressly considered and denied by the state court. True it is, that the immunity which was asserted was first claimed in a petition for rehearing; but, as the question was raised, was necessarily involved, and was considered and decided adversely by the state court, there is jurisdiction. *Leigh* v. *Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390."

In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, the court pointed out,

> "*that the true and rational rule is that the court must be able to see clearly from the whole record that a certain provision of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.*"

From the whole record in the case at bar it is clear that the title claimed by appellees to said land is rested upon a deed from Loman to Hawk, and appellants contend that said deed is illegal and void because Loman had no power under the federal law to alienate said land when he executed said deed to Hawk.

ARGUMENT *on the* MERITS

The four errors set out in the assignment of errors in this brief as committed by the trial court, are so interwoven that it is difficult to discuss them separately without repetition, therefore we will discuss them all together and try to separate the argument by sub-heads in the brief so that the court can readily apply the argument to the different errors complained of.

The errors complained of as committed by the Supreme Court of Oklahoma, and now set out in the assignment of errors, all depend upon the question as to whether the appeal from the trial court to the Supreme Court of Oklahoma was governed by the laws of the United States in force in the Indian Territory prior to statehood, or whether it was governed by the laws of the State of Oklahoma, and we have discussed this question fully on the motion to dismiss. It will therefore not be necessary to notice these errors separately.

We are aware that in discussing the motion to dismiss that of necessity a great deal of our argument applied to the merits and especially what we said under the heading, "Federal Rights Presented To and Denied By the Supreme Court of Oklahoma" (heading on page 21), and to save repetition we ask that this court consider what we said under said heading a part of our argument on the merits.

This case was originally begun in the United States Court for the Central District of Indian Territory, at Durant, by complaint filed in said court, entitled, "Complaint in Equity," in March, 1907. (Transcript, 7, 8, 9.)

This case was pending and undetermined in above court when Oklahoma became a state on November 16, 1907, and by the Statehood Act was transferred to the District Court of Bryan County, Oklahoma.

The question involved in this case is the title, possession and rents of allotment other than homestead of Thomas Loman, deceased, a full-blood Choctaw Indian and a member of the Choctaw Nation.

There is 99.06 acres of this land, and it is within a mile of Durant, and is worth, approximately, $5,000. (For description, see patent to Loman, Transcript 27, 28, Appendix 3.)

January 23, 1906, it is claimed that the Department of the Interior removed the restrictions on the sale of said land. (For removal certificate, see Transcript 33, Appendix 5.)

Appellants contend that the department had no power under the law to remove said restrictions, and said removal is a nullity.

That thereafter, on January 31, 1906, Thomas Loman and Lillie Loman, his wife, executed their warranty deed for said land to S. A. Hawk, and on

this deed the title of Lewis Paullin, defendant in error, to said land is rested. (For deed, see Transcript, 37, 38, Appendix, 3.)

Appellants contend that above deed of Loman to Hawk is illegal and void:

Because said land was not alienable when Loman executed the foregoing deed to Hawk on account of the restrictions against alienation contained in the title of Loman derived from the Choctaw and Chickasaw Nations to said land, and was also not alienable under the Acts of Congress, contracts, treaties, agreements and power of attorney set out herein.

Source of Loman's Title and His Legal Rights Discussed

Thomas Loman derived his title to said land from the Choctaw and Chickasaw Nations, and the title of said nations is rested on a patent from the United States dated February 24, 1831, and said patent is in part as follows:

> "*Therefore*, in consideration of the premises and in execution of the agreement and stipulations in the aforesaid treaty, the United States of America do give and grant unto the said nation the aforesaid 'Tract of Country West of the Mississippi.'
>
> To have and to hold the same in fee simple to them and their descendants, to inure to them

while they shall exist as a nation, and live on it, liable to no transfer or alienation, except to the United States, or with their consent." (For said patent, see Appendix 10.)

Fleming v. *McCurtain*, 215 U. S. 56.

In above case the title of the Choctaw Nation and the transfer of a part of said land to the Chickasaw Nation is set out, and, briefly, above case holds that the Choctaw and Chickasaw Nations are the owners of the fee simple title to said land, liable to no transfer or alienation except to the United States or with their consent.

The Choctaw and Chickasaw Nations were the grantors in the patent that conveyed and transferred said land to Thomas Loman and said patent was executed by the Choctaw and Chickasaw Nations with the consent and approval of the United States as provided in the patent of the United States to said nations for said land set out above.

The patent from the Choctaw and Chickasaw Nations to Loman contained the following clause:

"Subject, however, to the provisions of the Act of Congress approved July 1, 1902 (32 Stat. 641)." (For patent, see Transcript 27, 28, Appendix 2.)

On account of the foregoing clause in said patent all of the provisions of the Act of Congress of July 1, 1902, became a part of said patent and thereby all the restrictions against the alienation of said

land in said Act of Congress were made a part of said patent the same as if said restrictions were written out in full in said patent.

It must be conceded in this case:

First, that the Choctaw and Chickasaw Nations were the owners of the fee simple title to the land involved herein;

Second, that the Choctaw and Chickasaw Nations transferred by patent to Thomas Loman said land with the consent of the United States;

Third, that the said patent to Loman contained all the restrictions against alienation of said land contained in the Act of Congress of July 1, 1902, known as the Supplemental Agreement, and that the Choctaw and Chickasaw Nations have not at any time and in any way consented to the removal of the restrictions contained in said patent.

Restrictions in Patent Binding Upon Loman and the Tribe and Government.

The appellants contend that the Choctaw and Chickasaw Nations, the grantors in the patent to Thomas Loman, had the lawful right to restrict, as they did, the alienation of said land by the grantee in said patent, Thomas Loman.

In *Tiger* v. *Western Investment Co.*, 221 U. S 286, the court said:

"We know of no reason, nor has any been suggested, why it was not competent for Congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges, and immunities of citizens, while it retained, for the time being, the title to certain lands in trust for their benefit, and withheld from them for a certain period the power to sell, lease, or otherwise dispose of their interest in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property and to withhold from the donee for a season the power to sell or otherwise dispose of it."

When Loman accepted the patent and the benefits therein from his grantors, the Choctaw and Chickasaw Nations, Loman was bound by the restrictions against the alienation of said land contained in said patent.

In *Choate* v. *Trapp*, 224 U. S. 665, the court said:

"Upon delivery of the patent the agreement was executed, and the Indian was thereby vested with all the right conveyed by the patent, and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance, bound by its terms, although it was not actually signed by him. *Keller* v. *Ashford*, 133 U. S. 621, 33 L. ed. 672, 10 Sup. Ct. Rep. 494; *Hendrick* v. *Lindsay*, 93 U. S. 143, 23 L. ed. 855."

When Loman Accepted the Patent He Was Bound and So Was the Tribe and Government.

In the *Choate* case above, the court said:

> "After he accepted the patent, the Indian could not be heard, either at law or equity, to assert any claim to the common property. If he is bound, so is the tribe and the government when the patent was issued."

Act of Congress Unconstitutional.

Appellants further contend that the Act of Congress approved April 21, 1904 (33 Stat. 204), and under which it is claimed the restrictions upon the alienation of the Loman land were removed as to the Choctaws and Chickasaws is repugnant to the Constitution of the United States, and Congress had no power to pass said act:

Because said agreement which contained the restrictions against alienation is an agreement for a valuable consideration, and is a binding obligation upon all of the parties to said agreement. Section 73 of said agreement is, in part, as follows:

> "This agreement shall be binding upon the United States and upon the Choctaw and Chickasaw Nations and all Choctaws and Chickasaws."

In *Choate* v. *Trapp*, 224 U. S. 665, the court said:

> "As plaintiffs were offered the allotments on the conditions proposed; as they accepted the

terms and, in the relinquishment of their claim furnished a consideration which is sufficient to entitle them to enforce whatever rights were conferred, we are brought to the consideration of the question as to what those rights were."

In the above case, the Supreme Court, in referring to Indian rights, said:

"His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status. This was clearly recognized in the leading case of *Jones* v. *Meehan*, 174 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1. There it appeared that an Indian chief owned in fee land which fronted on a stream. The chief died, and in 1891 his son and heir, during the continuance of the tribal organization, let the land to Meehan for ten years. In 1894 he again let the same property to Jones for twenty years. In that year the Secretary of the Interior was authorized by Congress to approve the lease to Jones if the latter would increase the rental. This he did, and with the assent of the Indian and the Secretary of the Interior a lease was made to Jones. In the litigation which followed, Meehan relied on the first contract, made in the exercise of the Indian's right of private ownership. Jones relied on that made under congressional authority; and although the Indian was a member of the tribe, and much more subject to legislative power than these plaintiffs, the court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Con-

> gress had power to make treaties, it could not affect titles already granted by the treaty itself."

Appellants contend that the restrictions against alienation contained in the Supplemental Agreement and the patent to said land were a protection to Loman and his heirs against their own improvident acts, and as Loman was a full-blood Choctaw Indian and did not understand the English language, and was ignorant of land values, said restrictions were of great property value to Loman and his heirs, the appellants herein, and is an incident attached to the land itself for a limited period, and is a contract and a property right which had been vested in Loman and his heirs by the Supplemental Agreement and the patent and said rights are protected from repeal by the 5th Amendment to the Constitution of the United States.

We quote the following from *Choate* case above:

> "But there was no intimation that the power of wardship conferred authority on Congress to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the 5th Amendment."

In short, the Choctaw and Chickasaw Nations were the owners of the fee simple title to the land involved herein and were the grantors in the patent

to Loman, and said patent contained certain lawful restrictions against the alienation of said land for the protection of Loman and his heirs, the appellants herein, and that the United States approved said patent with said restrictions contained therein; that Loman, the grantee in said patent, by accepting said patent was bound by said restrictions, and Loman, in violation of said restrictions, unlawfully executed a certain illegal and void deed to Hawk, and under said illegal and void deed the adverse claimants unlawfully assert title to said land.

Laws of Arkansas Put in Force in Indian Territory and Made to Embrace Indians

Act of Congress of February 19, 1903 (32 Stat. L. 841), put in force in the Indian Territory chapter 27 of Mansfield's Digest of the Statutes of Arkansas of 1884, and we quote the following therefrom:

> "*Sec. 661.* Every letter of attorney containing a power to convey any real estate as agent or attorney for the owner thereof, or execute as agent or attorney for another any deed or instrument in writing that shall convey any real estate, or whereby any real estate shall be affected in law or equity, shall be acknowledged or proven and certified and recorded with any deed that such agent or attorney shall make in virtue of such letter of attorney."

"*Sec. 663.* No letter of attorney, duly acknowledged or proved, and certified as prescribed by this act, shall be revoked but by the maker of such letter of attorney or his legal representatives, which revocation shall be in writing, acknowledged or proved before the proper court or officer, and filed for record in the county or counties where such letter of attorney was intended to operate—all such letters of attorney shall be revoked and deemed void from the time of filing such revocation for record."

Act of Congress of April 28, 1904 (33 Stat. L. 573), is in part as follows:

"All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace all persons and estates in said territory, whether Indian, freedmen, or otherwise, and full and complete jurisdiction is hereby conferred upon the District Courts in said territory in the settlements of all estates of decedents, the guardianships of minors and incompetents, whether Indians, freedmen, or otherwise."

By the last mentioned Act of Congress all the laws of Arkansas heretofore put in force in the Indian Territory were made to apply to Thomas Loman and under said laws Loman had the same right to contract for his protection and benefit as other citizens and residents of the United States.

On June 17, 1905, Thomas Loman executed an instrument entitled, power of attorney, in favor of

Charles H. Williams, for said land, which briefly provided that Thomas Loman constituted and appointed Charles H. Williams as his sole and only true and lawful agent and attorney in fact, with full power to lease, sell and convey in whole or in part and receive the rents and considerations for such leases and conveyances, or in other words, conferred on the said Charles H. Williams power to do all things that he might lawfully do himself, which power of attorney is set out in full on pages 30-31 of Transcript; Appendix 6 herein.

At the time of the conveyance by Loman to Hawk and up to the time of the institution of this suit Charles H. Williams was in possession of said land under said power of attorney, and said power of attorney having been executed prior to statehood, is governed by the laws in force at the time of its execution, which were the Statutes of Arkansas above quoted, and which, by Act of Congress, became federal laws in force in the Indian Territory.

Section 663 of said laws provide how a letter of attorney shall be revoked which briefly is that no letter of attorney shall be revoked but by the maker or his legal representatives, which revocation shall be in writing, acknowledged and recorded. It has not been claimed or suggested by appellees in any stage of this proceeding that said power of attorney was revoked, as provided in said section 663.

Our contention is, that said power of attorney could not be revoked only as provided in said section 663, and therefore has not been revoked, and we further contend that while said power of attorney was in force, Loman was without power to convey said land and his deed to Hawk is therefore void.

If the power of attorney was not revoked until Loman's death, as held by the trial court below, then the deed from Loman to Hawk was void, for it was executed before Loman's death and should have been canceled as a cloud upon intervenor's title.

All the property rights of Loman stand upon the same footing and are enforceable in the same way as other residents or citizens of the United States.

In *Choate* v. *Trapp*, 224 U. S. 665, the court says:

> "There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents and citizens of the United States. *Re Heff*, 197 U. S. 504.
>
> *Cherokee Nation* v. *Hitchcock*, 187 U. S. 307;
> *Smith* v. *Goodell*, 20 Johns. 188;
> *Lowry* v. *Weaver*, 4 McLain 82;
> Fed. cases No. 8, 584;
> *Whirlwind* v. *Vonderahe*, 67 Mo. App. 628;
> *Taylor* v. *Drew*, 21 Ark. 478."

Congress Has Power to Add to the Restricted Period

We are aware that this court held in *Tiger* v. *Western Investment Company*, 221 U. S. 268, that Congress has the power for the protection of Indians to add to the restricted period.

We have no fault to find with this decision, but it does not follow from this decision that Congress had the power to remove the restrictions upon Indians, conditioned as Loman was (incompetent to sell his land), when the removal must result, as it did in his case, in his great financial loss, and when said restrictions were put in the patent to Loman by the grantors therein, the Choctaw and Chickasaw Nations, for the protection of Loman and his heirs, the appellants herein, and the Choctaw and Chickasaw Nations have not consented to the removal of the restrictions contained in said patent.

It must be borne in mind that to add to the restricted period of Indians, conditioned as Loman was, is always a benefit and protection to them, and to remove the restrictions is always a detriment and a financial loss to them.

If there is any doubt as to the power of Congress to remove the restrictions, that doubt should be resolved in favor of protecting Loman and his heirs, the appellants herein.

In the *Choate* case above, the court said:

> "The provision that 'all land shall be non-taxable' naturally indicates that the exemption is attached to the land,—only an artificial rule can make it a personal privilege. But if there is any conflict between the natural meaning and the technical construction,—if there were room for doubt, or if there were any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that doubt, under this rule, must be resolved in favor of the patentee."

Testimony of Carr That Hawk Paid Six Hundred and Fifty Dollars for the Land.

The deed from Loman to Hawk recites a consideration of $1500. In the deposition of Thomas Carr, taken December 23, 1907, in this case, he testifies in part as follows:

> "My name is Thomas G. Carr; postoffice, Garvin, Oklahoma; age, 28. On January 31st, 1906, I took the acknowledgment of Thomas Loman and his wife, Lillie Loman, to a deed to S. A. Hawk; from the conversation between the parties at that time I understood that Thomas Loman had been paid One Hundred Dollars and the amount paid at that time, in check and notes, to the best of my recollection, was Five Hundred and Fifty Dollars, making a total consideration for the deed, to the best of my recollection, of Six Hundred and Fifty Dollars." (Transcript, p. 24.)

The evidence of Thomas Carr above was the only evidence introduced at the trial of this case as to the amount paid by Hawk to Loman for said land, and Carr's evidence on this point is controlling, and by this evidence it is established that the amount paid by Hawk to Loman for said land was $650.

Several witnesses testified in the trial court as to the value of said land (for their testimony see Transcript, pages 41 to 50), and the value of said land, as fixed by said witnesses, varies from $20 to $50 per acre, and as it was agreed there was one hundred acres of said land, the total value fixed by said witnesses is $2000 to $5000, and the value of said land thus fixed was from three to seven times the amount paid by Hawk to Loman, $650, for said land. From above, it is plain that Loman did not receive a reasonable value for said land.

The rents are fixed by the agreed statement of facts herein, which briefly provides that there is 100 acres of said land, and it is worth a reasonable rental value of $2.00 per acre per year (being $200 per year). We should recover rents from June 17th, 1910.

Request This Honorable Court to Render Final Judgment

We hope that this court will decide this case on its merits, as Indian rights are involved therein, and it has been pending since March, 1907, over six years, and the only questions involved in the final decision in this case are the title, possession and rents of said lands.

And for the additional reason that the Supreme Court of Oklahoma, in deciding this case, said:

> "The question whether a guardian may, in his own name, prosecute an action to remove a cloud from the title of his ward's real estate by an independent suit or by plea of intervention, as has been attempted to be done in the case at bar, is not presented by the motion before us, or by the briefs filed by counsel, and upon that question we express no opinion." (Transcript, 77, Appendix, 8.)

We very much fear from the above that if this case is remanded to the Supreme Court of Oklahoma, they will hold as indicated above, that the guardian, Hagon John, cannot maintain this action, and will dismiss this case again. We therefore respectfully ask this court to render a final judgment in favor of plaintiffs in error, as prayed for in their plea of intervention. (Transcript 23, Appendix 7.)

Respectfully submitted,

NAPOLEON B. MAXEY,
Attorney for Plaintiffs in Error.

APPENDIX 1.

Amended Complaint in Equity.

In the United States Court for the Durant Division, Central District, Indian Territory—No. .....
Lewis Paullin, Plaintiff, v. Choctaw-Chickasaw Inv. Co. et als., Defendants.

AMENDED COMPLAINT IN EQUITY.

To the Hon. Thos. G. Humphry, Judge of Said Court:

Comes now Lewis Paullin, Plaintiff and for his amended complaint complains of the Choctaw-Chickashaw Investment Co., Elmer Williams, Eli P. Williams, A. T. Banks, Tom Anderson, —— Maddox and —— Thomas, defendants, and shows that the said Lewis Paullin is a citizen of the United States, and resides in the Indian Territory, his post office address being Durant, I. T.; That the Choctaw-Chickashaw Investment Co., is a Corporation duly incorporated under the laws of the Indian Territory, authorized to do business therein, with its principle places of business in said Territory at Ardmore, and with a branch office at Durant; that R. F. Grafa is the Agent of said Investment Co., on whom service can be produced at Durant. That Elmer Williams and Eli P. Williams are nonresidents of the Indian Territory, and live in the State of Kansas, and their post office address is McPherson, Kansas. That A. T. Banks, Tom Anderson, —— Maddox and —— Thomas are citizens of the United States and reside in the Indian Territory, near Durant, and within the Jurisdiction of this Court.

For cause of action herein the said Lewis Paullin shows that one Thos. Loman is a citizen by blood of the Choctaw Nation of the Indian Territory, that

as such citizen on July 21st, 1903, he received from the proper authority his allotted certificate to the following described land, a copy of which is filed herewith marked Exhibit "A," the East half of the north west quarter and the west half of the North west quarter of Section six (6) Township seven (7) South Range (9) east in the Indian Territory, and that upon the recommendation of Dana H. Kelsey, U. S. Indian Agent, the restrictions of the said Thos. Loman were on the 23*rd* day of January, 1906 duly and legally removed, a copy of which is herewith filed and marked exhibit "B," and that thereafter to-wit on January 21st, 1906, the said Thos. Loman joined by his wife Lille Loman by their warranty deed for the consideration of $1,500 bargained, sold and conveyed the above described land to S. A. Hawk, which deed was duly filed and recorded in the United States Clerk's office at Durant, I. T., on February, 1, 1906, a copy of which deed is filed herewith and marked "Exhibit "C" that hereafter to-wit on the 17th day of January, 1907, the said S. A. Hawk and his wife Sara E. Hawk by warranty deed and for the consideration of $2,700.00 to them in hand paid by E. E. Fuller, conveying the above described land to the said E. E. Fuller, by deed, and which on the 20th day of February, 1907, was duly recorded in the United States Clerk's Office at Durand, I. T., a copy of which Deed is filed herewith and marked Exhibit "D" and thereafter to-wit on the 12th day of February, 1907, the said E. E. Fuller joined by his wife Ella R. Fuller, by warranty deed, and for the consideration of $2,800.00 $2,300.00 of which was then paid, conveyed the said land to Lewis Paullin, plaintiff herein, which deed was on the 20th day of February, 1907, duly filed and recorded in the office of the United States Clerk at Durant, I. T., a copy of which deed is filed herewith and marked "Exhibit "C" That the said Lewis Paullin is the

owner in fee simple of said above described land, and is entitled to the possession, use and occupancy of said land.

That on July 21, 1903, the date upon which said land was filed upon, said Thos. Loman made and executed a lease on said premises for a period of five years from date, to the Choctaw-Chickasaw Investment Co., for the consideration of $25.00 per annum, and on July, 1st, 1904, the said Thos. Loman executed a lease on said land for the period of five years from said date to one, Elmer Williams for the consideration of $25.00 per annum and on June 17th, 1905 the said Thomas Loman executed a lease on said property for a term of five years from date to Eli P. Williams, the consideration thereof being $225.00 said to have been paid and in addition the lessees agreed to pay $100 as follows: $25.00 on the First day of August of each year beginning with 1906. That the said land consists of 100 acres less than one half mile from the City of Durant, and about seventy-five to which is in cultivation, worth for rental purposes the sum of $2.00 an acre per annum, that all of said land now in cultivation was in cultivation when each and all of the leases were executed, that the consideration expressed in said leases are totally inadequate, and fraudulent.

That the said lease to the said Choctaw-Chickasaw Investment Co., said Elmer Williams said Eli P. Williams were really and truly made to one and the same person, for the purpose of extending the leases for more than five years, which would be in controvention of the law limiting leases on lands in the Indian Territory to a period of five years.

That in truth and in fact the said Choctaw Chickasaw Investment Co., although a corporation is owned, officered and controled by the said Elmer Williams, and Eli P. Williams, therefore said lease

contracts are in contravention of the law limiting leases for a period of five years, and further that the said R. F. Grafa of Durant, I. T., is the Agent for the said Choctaw-Chickasaw Investment Co. Elmer Williams, Eli P. Williams, and A. T. Banks, Tom Anderson, —— Maddox, and —— Thomas are tenants in possession of the said above described land, that they and each of them rented said land from the said R. F. Grafa, the Agent of the said defendants as aforesaid, That by reason of the above alleged facts the said Lewis Paullin, in entitled to the possession and use of said property. That sais lesse-s are a cloud upon the title of this plaintiff, which excludes him from the possession thereof, and diminishes the value of said premises if the said Paullin should desire to sell the same; and that said lessee- are setting up rights and claims under said leases antagonist- to the rights and interests of this plaintiff, to his great damage.

Further complaining complainant states that said Thos. Loman was a full blood Indian; that he was totally without education being unable to speak or write the English Language; that he was weak minded, ignorant and easily influenced; that the defendants Eli P. Williams and Elmer Williams well knew these facts and took advantage of the ignorance and want of education and also want of knowledge of the English Language, and of his enfeebled mental condition in the procur-ment of the leases above mentioned in this complaint; that they induced said Thos. Loman to executed the said leases when he had no knowledge of what he was doing nor of the nature and character of the instrument which he was signing; that the said Eli P. Williams and said Elmer Williams by duress and by fraud and by false representations, by artifice and deceit induced said *said* Thos. Loman to accept for the leases

a total inadequate consideration and but for the practice of the said duress, undue influence and fraud he would not have executed and signed said leases nor have been content with the consideration provided for and expressed in the instrument of lease.

Further complaining complainant states that the exercise of the above acts of duress, undue influence, fraud and deceit together with the inadequate consideration provided for in the instrument of lease constituted a fraud upon the said Thos. Loman.

Plaintiff further complains state- that the lease herein before mentioned, to-wit; the lease to Eli P. Williams had in it a section relating to coal and gas, and that the other did not and for this reason same was and is void, never having been approved by the Secreta- of the interior as required by Law.

Wherefore complainant shows that said leases should be declared null and void, and that the same should be cancelled. *(a)* because in effect and purpose they run for a term longer than five years, and are therefore void. *(b)* because the consideration expressed in each of said leases, if in fact paid by the said lea-ees are totally inadequate for land in cultivation, and are therefore fraudulent and void *(c)* because in truth and in fact said consideration as expressed in said contract, if paid, are insufficient and inadequate for such land, but said consideration- have not been paid as expressed in said lease contracts and for this reason the same should be declared void. *(d)* because said lease contracts were obtained from said Thos. Loman by the said Eli P. Williams and said Elmer Williams, by the practice of duress undue influence fraud and deceit for those reasons the same should be declared void.

That while said *r*enants rented said land from R. F. Grafa Agent of said lessees as above explained, they are in truth and in fact tenants of the said Lewis

Paullin, and should attorn to him as their land-lord. And that said Paullin is entitled to the rents thereof for the year, 1907.

Premises considered the said Lewis Paullin prays that all defendants herein be cited as required by law to answer his complaint herein, at the next term of the Court, and that upon hearing he have judgment, declaring said leases and all of them void and that the cloud on his title created thereby be removed and that said tenants be required to pay unto said Lewis Paullin all the rents due on said premises during the year 1907, that he have all necessary orders of the Court to put him in possession of said premises, and to collect said rents and that he have judgment for his costs in this behalf expended, for all of which he will ever pray etc.

(Signed) LEWIS PAULLIN, *Plaintiff.*

APPENDIX 2.

Allotment Patent to Thomas Loman.

Allotment Patent No. 2526. Choctaw Roll No. 3280.

Date of Certificate July 21st, 1903.

The Choctaw and Chickasaw Nations, Indian Territory.

To all to Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat. 641), and ratified by the citizens of the Choctaw and Chickasaw Nations, September 25, 1902, it was provided that there should be alloted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred

and twenty-acres of the average allottable lands of the Choctaw and Chickasaw Nations; and

Whereas, It was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of Thomas Loman a citizen of the Choctaw Nation, as an allotment exclusive of land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nations selected as a homestead as aforesaid:

Now, Therefore, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1908 (30 Stat. 495), have granted and conveyed, and by these presents do grant and convey unto the said (Same name as above) Thos. Loman all right, title, and interest of the Choctaw and Chickasaw Nations, and of all other citizens of said Nations, in and to the following described land, viz.

The west 19.60 acres of Lot Two (2) and Lot numbered Three (3) and the Southeast quarter of the Northwest quarter of Section Six (6) Township Seven (7) South Range Nine (9) east of the Indian Base and Meridian, in Indian Territory, containing 99.06 acres, more or less, as the case may be, accord-

ing to the United —— survey thereof, subject, however, to the provisions of the Act of Congress approved July 1, 1902 (32 Stat. 641).

In Witness Whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Date Nov. 22nd, 1904.

(Seal, Choctaw Nation.) GREEN MCCURTAIN,
Principal Chief of the Choctaw Nation.

Date December 9th, 1904.

(Seal, Chickasaw Nation.) DOUGLAS H. JOHNSON,
Governor of the Chickasaw Nation.

Department of the Interior. Approved Sept. 8th, 1905.

THOMAS RYAN, *Acting Secretary.*
By OLIVER A. PHELPS, *Clerk.*

Filed for record in office of the commission to the commission to the Five Civilized Tribes at Muskogee, I. T., Sept. 18th, 1905, and recorded in Book 3, Page 290.

APPENDIX 3.

Deed—Loman to Hawk.

GENERAL WARRANTY DEED.

This Indenture made and entered into this 31st day of January, one thousand nine hundred and six by and between Thomas Loman and Lilly Loman, husband and wife, parties of the first part, and S. A. Hawk of South McAlester, I. T., party of the second part.

Witnesseth that the said parties of the first part for and in consideration of the sum of Fifteen Hundred (1,500.00) Dollars in hand paid the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey and confirm unto said party of the second part the following described real estate and premises situate in the Choctaw Nation, and within the limits of the Indian Territory, to-wit, The east one half (E. ½) of the north west one fourth (N. W. ¼) and the west one half (W. ½) of the northwest one fourth (N. W. ¼) of the north east one fourth (N. E. ¼) of section six (6) in township seven (7) south and range nine (9) east, the same being the allotment of Thomas Loman, other than the homestead and the restrictions upon the sale of the same having been removed by the Secretary of Interior.

Together with all the improvements thereon, and appurtenances thereunto belonging or in any wise appertaining thereunto *belonging or in any wise appertaining thereto*, and warrant the title to the same.

To have and to hold the said lands unto the said party of the second part, his heirs, executors, administrators and assigns forever, and we hereby covenant that we have the right to sell the lands allotted as aforesaid, and in the event of said allotment being cancelled from any cause that conveyance shall include any and all lands selected in lieu thereof, the same as if specially described herein.

And I, Lilly Loman wife of Thomas Loman, the grantor herein, do hereby join the conveyance and for the consideration aforesaid convey and renounce all right of homestead in and to said property, and for the said consideration do hereby release and relinquish unto the said S. A. Hawk his heirs and assigns all right claim and possibility of dower in and to said property.

We further covenant that said lands are free of incumbrances and leases except ——.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

his
THOMAS X LOMAN. (Seal)
mark
her
LILLY X LOMAN. (Seal)
mark

Witness- of marks of Thomas Loman and Lilly Loman:

T. G. Carr.
A. E. Beckner.
Annie Mitchell.

(Acknowledgment omitted.)

APPENDIX 4.

Agreed Statement of Facts.

In the United States Court for the Durant Division, Central District, Indian Territory.

Filed May 20, 1908. W. H. L. Campbell, Clerk of the Supreme Court, by —— ——, Deputy.

Lewis Paullin, Plaintiff, v. Choctaw-Chicasaw Investment Co. et als., Defendants.

To the Hon. D. A. Richardson, Special Master:

Comes now Crochett & Hayes attorneys of record for Plaintiff, and Crook & Kyle attorneys of record for the defendant Eli P. Williams, and C. C. Parker attorney for non-resident defendants Chas. H. Williams and Elmer Williams, and agree that the

following facts are true in said cause for all purpose- of said trial but the admi*nisa*bility of the same in testimony before the said Master is subject to any and all legal objections.

That the allegations in said petition with reference to the residence and place of business of the plaintiff and each of the defendants is true and that all of the defendants in said cause have been legally served and that this court has jurisdiction of said parties and said cause of action.

That Thomas Loman is a citizen by blood of the Choctaw Nation, was a full blood Choctaw Indian, illiterate, and ignorant of business transactions and incompet*ant* to transact such business as the sale or lease of real estate. That as such citizen of July, 21, 1903, he received from the proper authority his allotment certificate to the following described lands: E 2 of N. W 4 and the W 2 of the N. W 4 of the N. E 4 of Section 6 T. 7 S., R. 9 E in the Indian Territory, that on said July 21, 1903 the date upon which said allotment certificate was issued said Thomas Loman made and executed the lease on said premises for a period of five years from date to the Choctaw-Chickasaw Investment Co., the consideration therefor being $25.00 per annum; that one year thereafter to-wit, July, 1, 1904, the said Thomas Loman executed lease on said land for the period of five years from said date to one Elmer Williams for the consideration of $25.00 per annum and that on June 17, 1905 the said Thomas Loman executed a lease on said property for a term of five years from date to Eli P. Williams the consideration therefor being $225.00, said to have been paid and in addition the le*assee* agreed to pay $100.00 as follows, $25.00 on the 1st day of August beginning with 1906; that on same date to-wit June, 17, 1905 Thomas Loman made and executed to Chas. H. Williams an instru-

ment conveying said land, the consideration therefor being $1.00 appointing him the said Chas. H. Williams his Agent and attorney in fact, empowering him to do any and all acts at any and all times that said Loman could do for himself in the management sale and renting, etc. of said land, and in the same conveyance for the sum of $4.00 the said Loman agreed to convey and transfer said Agent and attorney an interest in said land for the period of fifteen years or to the first of January, 1920.

Third. That Eli P. Williams at the time of the making of said leases was Secretary of the Choctaw-Chickasaw Investment Co., and signed said leases as such Secretary; that said Elmer Williams and Chas. H. Williams are sons of said Eli P. Williams are interested in each and all of said leases. And that Eli P. Williams was a witness to the signature of Thomas Loman to lease to Elmer Williams.

Fourth. That said Chas. H. Williams has rented this land, collected all the rents therefore, paid what little has been paid for said leases and the other have never paid a cent thereon nor collected any revenue therefrom.

Fifth. That it is the custom of the said Choctaw-Chickasaw Investment Co., the said Eli P. Williams, Elmer Williams and Chas. H. Williams in their real estate dealing in the Central District of the Indian Territory to take similar instrument as these covering this land and that the same—invariably made to the same parties to whom the said Thomas Loman has executed conveyances on the land in controversy.

Sixth. That R. F. Grafa of Durant, Indian Territory is the Agent of the said Choctaw-Chickasaw Investment Co., is also the agent of Eli P. Williams, Elmer Williams and Chas. H. Williams, and has done the renting and looking after the said Loman tract of

land in the capacity of Agent for all of said parties and no one else has sought to exercise any control over same during the life of said leases.

Seventh. That said land consists of 100 acres within two miles of the city of Durant, about seventy acres of which is in cultivation, and the same being in cultivation at the time the first of said leases was executed; that said land for each and every year since 1903 was reasonable worth the sum of $2.00 per acre as rental.

Eighth. That A. T. Banks, Tom Anderson, —— Maddox and —— Thomas are the tenants now in the actual possession and cultivating the said land.

Signed this the 14th day of October, 1907.

(Signed) CROCKETT & HAYES,
Attorneys for Plaintiff.

CROOK & KYLE,
Attorneys for Eli P. Williams.

CHAS. C. PARKER,
Attorneys for Elmer & Chas. H. Williams.

APPENDIX 5.

Removal of Restrictions on Loman's Allotment.

Removal of Restrictions, Dated Dec. 29th, 1905, and Filed for Record in the Office of the Commission to the Five Civilized Tribes at Muskogee, Ind. Ter., Feb. 9, 1906, and Recorded in Book 3, Page 529, and in the Office of the Clerk and Recorder at Durant, March 10, 1906, and Recorded in Book 18, Page 29. Number 2000. Roll No. 3380.

In the Matter of the Application of Thomas Loman, a Citizen by Blood of the Choctaw Nation, for

the Removal of the Restrictions upon the Sale of His Allotment, Except His Homestead.

In accordance with the regulations approved by the Secretary of the Interior, May 12, 1904, in conformity to the provisions of the Act of Congress approved April 21, 1904 (33 Stats. 204), I have made a full investigation in connection with the application of Thomas Loman, a citizen by blood of the Choctaw Nation, for the removal of the restrictions upon the alienation of his allotment (except his homestead), and am, as the result of the investigation, satisfied that the removal of restrictions upon the alienation of * * * allotted lands, except as to * * * homestead will be for the best interests of the allottee, and I so recommend. The approval of this certificate does not in any manner determine the right of the allottee to any particular tract of land.

DANA H. KELSEY,

United States Indian Agent.

Department of the Interior, Washington, D. C., Jan. 23, 1906, 190—. Approved: ——— ———. THOS. RYAN, *Secretary of the Interior, First Asst.*

APPENDIX 6.

Power of Attorney.

Know all men by these presents that, I, Thomas Loman for and in consideration of the sum of $1.00 to me in hand paid, the receipt of which is hereby acknowledged, have on this day appointed, and by these presents appoint, constisute and nominate Charles H. Williams my sole and only, true and lawful agent and attorney in fact with full power to

lease, sell and convey, in whole or in part, and receive the rents and considerations for such sales and conveyances, the lands heretofore filed on by me as my allotment, E. ½ of N. W. ¼ and W. ½ of N. W. ¼ of N. E. ¼ of Section 6 in Township 7 South Range 9 East in the Indian Territory.

My agent and attorney in fact named herein is hereby authorized and empowered to do any and all acts at any time, that I could lawfully do my self relative to the renting, leasing, selling, conveying, controlling and managing said lands, and I hereby ratify and confirm all the acts of my agent and attorney in fact relative to said lands, and for a further and additional consideration of the sum of $4.00 00 paid to me on this date, and other valuable good and sufficient considerations, the receipt of same is hereby acknowledged, I hereby sell, convey and transfer to said agent and attorney in fact named herein an interest in all the above lands and the rents thereof and agree that this power of attorney is coupled with an interest in said lands and the rents thereof, and I further agree in consideration of the payment mentioned above that this power of attorney shall not be revoked by me, my heirs, executors or administrators before the first day of January A. D. 1920.

All other power of attorney and agencies are hereby revoked and cancelled and the party named herein is my sole and only authorized and acting agent and attorney in fact.

Dated this 17th day of June, 1905.

his
THOMAS X LOWMAN.
mark

Witness to mark:

W. E. Forbes.
Geo. T. L. Vieter.

United States of America, Indian Territory, Central Judicial District—ss.

On this 17th day of June, A. D. 1905 personally appeared before me, a Notary Public of the above named District, Thomas Lowman to me personally well known to be the person named in the foregoing instrument and acknowledge- that he subscribed and executed the same for the consideration and purposes therein mentioned and set forth as his free, voluntary act and deed. And I do Hereby so certify.

(Seal) T. G. Garr, Notary Public.

APPENDIX 7.

Intervening Petition of Hagon John, Guardian.

In the United States Court for the Durant Division of the Central District, Indian Territory, at Durant. Lewis Paullin, Plaintiff, v. Choctaw-Chickasaw Investment Company et al., Defendants.

Comes now Hagon John, the duly appointed and acting guardian of Oscar Loman and Anna Loman, minors and by leave of Court first had and obtained presents this, his petition of intervention in the above entitled cause, and for cause of action against both plaintiff and defendant says:

That the land in controversy in this suit was the allotment of one Thomas Loman, a citizen by blood of the Choctaw Nation, and set apart to him on July, 21, 1903, by the Commission to the Five Civilized Tribes and is described as follows:

The West 19.60 acres of Lot Two (2) and the Lot numbered Three (3) and the Southeast quarter of the Northwest quarter of Section Six (6) Town-

ship Seven (7) South Range Nine (9) East, in the Choctaw Nation Indian Territory.

That said Thomas Loman died on the 17th day of June, 1905, leaving him surviving Oscar Loman and Anna Loman, his children and sole heirs at law.

Your petitioner further states that prior to the death of the said Thomas Loman he executed the leases and deeds described in plaintiff's complaint but that at the time of the execution of the same he was wholly incompetent to understand the nature of the business which he was transacting and that the same was procured by the parties thereto by fraud, misrepresentation and undue influence over him.

Your petitioner further represents that the said Thomas Loman was a full-blood Choctaw Indian without any education and unable to speak or write the English Language; that he was weak minded, ignorant and easily influenced and that the parties procuring said leases and deeds well knew these facts and took advantage of the ignorance, want of education and want of knowledge of the English Language and his enfeebled mental condition in the procurement of the said leases and said deeds mentioned in plaintiff's complaint, and that while said leases and deeds recite a valuable consideration there was, in fact no such amounts paid, and the amounts that were actually paid were wholly inadequate consideration for the land described therein.

Your petitioner further represents that long prior to the death of the said Thomas Loman he was wholly incapacitated from transacting any business on account of his ignorance old age and enfeebled condition, and that both the plaintiff and defendant and the persons from whom they claim to have derived title were all fully advised of his condition and knew the said conveyances were made by him when he did — have mental capacity enough to know what he was doing, and are therefore void and of no effect.

Your petitioner further states that he is informed and believes that while the deed from said Thomas Loman to S. A. Hawk recited a consideration of Fifteen Hundred Dollars that in truth and in fact no such consideration was paid but only a very small amount, the exact amount being to your petitioner unknown, and that the considerations mentioned in the deeds from Hawk to Fuller and from Fuller to Lewis Paullin, the plaintiff were not the true considerations paid.

Your petitioner further states that he is informed and believes, and so states the facts to be, that S. A. Hawk E. E. Fuller and Lewis Paullin, the plaintiff herein, conspired together for the purpose of defrauding the said Thomas Loman out of said land and that they procured, by fraud and misrepresentation the removal of the restrictions on the sale of said land, by the United States Indian Agent and Secretary of Interior, and that at the time said restrictions were removed that the said Thomas Loman did not know what was being done and had no conception of the transaction whatever, and that the said United States Indian Agent and Secretary of the Interior were deceived and misled as to the true condition of the mind of said Thomas Loman at the time said restrictions were removed, and that in fact said Thomas Loman never appeared before said United States Indian Agent but only before a subordinate of said Indian Agent and was not examined by him nor anyone else connected with the Interior Department but that said subordinate took only the evidence of said Hawk and such persons as he produced as witnesses, and that if said Indian Agent and Secretary of the Interior had been fully advised as to the condition of the said Thomas Loman they would have refused to remove the restrictions on the sale of said land.

Your petitioner therefore avers that the removal of the restrictions by said officers of the Interior Department, as well as the execution of the deeds and leases mentioned in plaintiff's complaint, were procured by fraud, deceit and misrepresentation, and should not prejudice the right of these intervenors.

The premises considered, your petitioner prays that the leases executed by said Thomas Loman to the defendants, Choctaw-Chickasaw Investment Co., Elmer Williams and Eli P. Williams, and the deeds executed by the said Thomas Loman to S. A. Hawk and by S. A. Hawk to E. E. Fuller and by E. E. Fuller to Lewis Paullin, the plaintiff, be cancelled, set aside and held for naught, as a cloud on these petitioners' title and that such other and further orders be made in the premises as will fully protect the rights of these intervenors.

(Signed)

N. B. Maxey,

Attorney for Intervenors, and Hagan John, G'd'n.

APPENDIX 8.

Judgment and Opinion of Supreme Court of Oklahoma.

Supreme Court, May Term, 1909, May 12th, 1909, Second Judicial Day. No. 292. Hagan John, Guardian, Plaintiff in Error, v. Lewis Paullin et al., Defendants in Error.

And now the above cause is this day submitted, and cross motion to consolidate withdrawn.

And thereafter to-wit: on the 14th day of September 1909, in the Supreme Court of Oklahoma, the following proceedings were had, in said cause:

Supreme Court, September Term, 1909, September 14th 1909, First Judicial Day. No. 202. *Hagon John, Guardian, Plaintiff in Error* v. *Lewis Paullin et al., Defendants in Error.*

And now this cause comes on for final decision and determination by the court upon the motion of defendant in error to dismiss the proceeding.

And the court having duly considered the same and being fully advised in the premises, finds that the above cause should be dismissed.

It is therefore ordered and adjudged by the court that the above cause, be, and the same is hereby dismissed.

Opinion by Hayes, J.

All the Justices concur.

Filed Sept. 14, 1909. W. H. L. Campbell, Clerk.

In the Supreme Court, State of Oklahoma. No. 202. *Hagon John, Guardian, Plaintiff in Error,* v. *Louis Paullin, Choctaw-Chickasaw Investment Co., Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants in Error.*

1. All parties to an action whose interests will be affected by a reversal of the judgment appealed from must be made parties to the appellate proceeding.

2. An appeal from a judgment against a guardian in an action prosecuted by him in his own name as guardian must be commenced within one year after the rendition of the judgment and all necessary parties to the proceeding must be brought into the appellate proceeding either by summons in error or by entry of general appearance within that period or the appeal will be dismissed.

(Syllabus by the Court.)

Error from the District Court of Bryan County.

Hon. Malcolm E. Rosser, Judge.

Maxey & Runyan, Attorneys for Plaintiff in Error.

Robert Crockett, V. B. Hayes, Attorneys for Defendants in Error.

Dismissed.

This proceeding is from a judgment of the district court of Bryan County in an action wherein defendant in error, Louis Paullin, was plaintiff, and the Choctaw-Chickasaw Investment Company, a corporation, Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas were defendants, and Hagon John, Guardian, was Intervenor.

Plaintiff, in his petition in the trial court, alleged for his cause of action that one Thomas Loman, a citizen by blood of the Choctaw Nation, on the 21st day of July, 1903, received as a part of his allotment of lands to which he is entitled as an Indian citizen, the east half of the northwest quarter and the west half of the northwest quarter of section 6, township 7 south, range 9 east. He alleges that on the 23rd day of January, 1906, the restrictions upon the power of the said Thomas Loman to alienate said lands were removed by the Secretary of the Interior and that on January 31st, 1906, Thomas Loman and wife, for a valuable consideration, conveyed the land to one S. A. Hawk, who, on the 17th day of January, 1907, by warranty deed conveyed the same to E. E. Fuller, and that E. E. Fuller conveyed said land, on the 23rd day of February, 1907, to plaintiff; that plaintiff is the owner in fee simple of said land and entitled to the possession

thereof. He alleges that on July 21st, 1903, the date upon which the lands were allotted to Loman, Loman made and executed a lease thereon for a period of five years from date to the defendant, Choctaw-Chickasaw Investment Company; that on July 1st, 1904, Loman executed a second lease for a period of five years from date to defendant Elmer Williams and on June 17th, 1905, he executed a third lease on the same property for the term of five years from date to defendant Eli P. Williams. He alleges that said three leases were in fact owned by one and the same person and were executed to three separate persons for the purpose of avoiding that provision of the law which prohibits an Indian citizen from leasing his land for a longer period than five years. He alleges that the defendants Banks, Anderson Maddox, and Thomas are tenants of the aforesaid defendants and are now occupying the premises in controversy. He further alleges that at the time of the execution and delivery by Thomas Loman of the aforesaid three leases, Loman was totally without education, being unable to speak or write the English language, was weak-minded, ignorant, and easily influenced; that the defendants to whom said leases were executed knew these facts and took advantage of the ignorance, want of education, and incapacity of Loman to execute the contract, and by fraud, deceit, duress and undue influence, procured from him the lease contracts for an inadequate consideration. Plaintiff prays in his petition that the lease contracts be declared null and void and be cancelled as a cloud upon his title, that he be given judgment for possession of the land and for rents for the year 1907. Defendants filed their answer in which they admit some of the allegations of the plaintiff's complaint and deny others. Plaintiff in error, Hagon John, hereinafter designated as intervenor, made application to the court for leave,

as Guardian of Oscar Loman and Annie Loman, minor children of Thomas Loman, deceased, to intervene in the action, which motion was by the court allowed. He thereupon filed his petition as the duly appointed, qualified and acting guardian of said minors, wherein he stated that he filed his petition of intervention as guardian of said minors, and for his cause of action against both plaintiff and defendant, says that the said Thomas Loman died on the 17th day of July, 1905, leaving him surviving as his sole heirs, said minor children; that Thomas Loman, before his death, executed the leases and deeds described in plaintiff's petition, but at the time of the execution of the same by him, he was wholly incompetent to understand the nature of the same and that each and all of said instruments were procured from him by the parties thereto by fraud, misrepresentation and undue influence over him, for a wholly inadequate consideration, and that the parties procuring said leases and deeds well knew at the time of the execution thereof that the grantor, Thomas Loman, was incompetent to execute the same.

Intervenor prayed that the leases executed by Loman to the Choctaw-Chickasaw Investment Company, Elmer Williams, and Eli P. Williams, and the deed executed by Loman to Hawk, and the deed executed by Hawk to Fuller, and the deed executed by Fuller to plaintiff, be cancelled as a cloud upon petitioner's title, and for general and special relief. The trial court found for plaintiff as against the intervenor, and dismissed intervenor's petition and found in favor of defendant Eli P. Williams as to the lease executed by Loman to him, holding that the same was a valid lease and in full force and effect, and rendered judgment decreeing that intervenor take nothing by his interplea and that same be dismissed, and that plaintiff's prayer for the cancellation of the lease from Loman to Eli P. Williams

be refused and denied, but that he have judgment against Eli P. Williams for the sum of $25.00 as the amount of rent due under said lease for the year 1907.

OPINION OF THE COURT BY HAYES, *J.*

Intervenor filed his petition in error in this court and plaintiff, as one of the defendants in error entered his general appearance within one year after the rendition of judgment in the lower court, but no summons in error was issued and served upon any of the defendants, nor did any of them enter a general appearance in this court within one year from the rendition of the judgment. Defendant in error, plaintiff below, now moves the court to dismiss the proceeding upon the ground that all the necessary parties had not been brought into this court by service of summons in error or by entry of general appearance within one year after the rendition of the judgment. In reply to this motion, plaintiff in error insists, *first*, that none of the defendants in the lower court are necessary parties, and *second*, that if any of them are necessary parties, by reason of section 4748 of Wilson's Revised and Annotated Statutes, which provides that in case a person entitled to a proceeding in error be an infant, such proceeding shall be commenced within one year after rendition of judgment exclusive of the time of such disability, the time in which to bring a proceeding in error has not yet expired, since his wards have not yet attained their majority, and that he should be permitted at this time to have summons in error issued and served upon the necessary parties.

In consideration of his first contention, it will be unnecessary for us to determine whether all of the defendants in the lower court are necessary par-

ties to this proceeding, for, if any one of them is a necessary party to this proceeding, then the motion will have to be sustained. *Strange et al. v. Crismon*, 98 Pac. 937. In *County Commissioners v. Harvey et al.*, 5 Okla. 468, it is held that all persons who are parties to a proceeding in the trial court and whose interest will be affected by reversal of the judgment on appeal must be brought into the appellate proceeding. The judgment of the trial court in the case at bar declares the lease contract of Eli P. Williams to be a valid contract and that defendant in error, Paullen, by virtue of his being the owner of the fee simple title to the land, under a warranty deed from the grantees of Loman, is entitled to the rents under such contract and awards him judgment against Eli P. Williams for the sum of $25.00 as rents for the year 1907. Eli P. Williams has not appealed from this judgment and, as between him and defendant in error, Paullin, it has become final.

If, on consideration of this appeal on its merits, it should be found that the judgment of the trial court should be reversed and the intervenor's plea of intervention should be sustained, then intervenor would be entitled to collect the rents under said contract and such reversal of the judgment would prejudicially affect the rights of Eli P. Williams, and he is therefore a necessary party to this proceeding.

Intervenor's second contention is also without merit. Section 4748 of Wilson's Revised and Annotated Statutes provides that all proceedings to reverse, vacate or modify a judgment or final order shall be commenced within one year after the rendition of the judgment or the making of the final order complained of except in cases where the person entitled to such proceeding may be an infant, a person of unsound mind, or imprisoned, in which event, such proceeding may be commenced within one year after

the rendition of judgment exclusive of the time of such disability. The second provision of this section does not include guardians. The plea of intervention in this case was not filed by intervenor's ward. They never became parties to this action in the lower court and have never become parties to the proceeding in this court. Intervenor filed his plea of intervention in the lower court as guardian of said wards. He stated in his petition that he filed same as guardian of said minor children, but this statement does not make the minors parties to the action. *Gorham* v. *Gorham*, 3 Barb. Ch. 24; *West* v. *West*, 90 Ala. 458. The proceeding in the trial court was prosecuted by the intervenor, plaintiff in error here, in his own name as guardian, and this proceeding is brought in the same manner. Had the minors been parties to the action in the lower court represented by their next friend or guardian *ad litem*, the provision of the statute relied upon by intervenor would apply and they would have one year after the removal of their disability in which to prosecute a proceeding in error.

Moss et al. v. *Hall*, 79 Ky. 40; *Ridgley* v. *Bennett et al.*, (Tenn.) 13 Lea 206; *Vardemark et al.* v. *Wilkinson*, 147 Ind. 56. But this provision of the statute does not extend to suits prosecuted by the guardian in his own name and the proceeding in error in this action is controlled by the first provision of said section 4748 and must be commenced within one year after the rendition of judgment and all necessary parties to the proceeding must be brought into the appellate proceeding either by summons in error or by entry of general appearance within that period. *Strange et al.* v. *Crimson*, (Okla.) 98 Pac. 937.

The question whether a guardian may, in his own name, prosecute an action to remove a cloud

from the title of his ward's real estate by an independent suit or by plea of intervention, as has been attempted to be done in the case at bar, is not presented by the motion before us or by the briefs filed by counsel, and upon that question express *no* opinion.

Assuming for the purpose of this motion to dismiss, without deciding, that the guardian has such power, this proceeding must be dismissed for the reasons previously stated.

Kane, C. J. Williams, Dunn, Turner, JJ., concur.

In the Supreme Court of the State of Oklahoma. United States of America, State of Oklahoma—ss.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and correct copy of the opinion of the Supreme Court, dismissing the appeal, in the case of *Hagon John, Guardian, Plaintiff in Error, v. Louis Paullin et als.*, No. 202, which was filed in this office September 14th 1909, the original of which remains on file in my office.

In Witness Whereof, I hereto set my hand and affix the seal of said Supreme Court April 20th 1911.

(Seal Supreme Court, State of Oklahoma.)

W. H. L. Campbell,
Clerk Supreme Court.
By Revel Haskell, Jr., *Deputy.*

APPENDIX 9.

Petition for Rehearing and Amendment Thereto.

In the Supreme Court of the State of Oklahoma. No. 202. *Hagon John, Guardian, Plaintiff in Error,*

v. Lewis Paullin, Choctaw-Chickasaw Investment Co., Elmer Williams, Eli P. Williams, Charles H. Williams, A. P. Banks, Tom Anderson, —— Maddox, and —— Thomas, Defendants in Error.

PETITION FOR REHEARING.

Comes now Hagon John, guardian of Oscar Loman and Annie Loman, minors, and petitions the Court for a re-hearing in the above entitled cause, for the following reasons, to-wit:

1st.

That said decision is based upon the statute requiring that appeals and writs of error must be sued out and perfected within one year from the date of the judgment. On the motion to dismiss, we called the Court's attention to section 4748 of Wilson's Digest providing that in case a person entitled to a proceeding in error be an infant, such proceeding shall be commenced within one year after rendition of judgment, exclusive of the time of such disability and insisted that the failure to bring in the other parties within a year was cured by reason of that statute, the plaintiffs in error being infants.

The Court, in its opinion dismissing the case, refers to that statute, but says that it does not apply to suits brought by guardians, as the bill in intervention in this case was not filed by intervener's wards, and they never became parties, and therefore did not come within the provision of the statute giving infants one year after reaching their majority to perfect their appeal.

This suit was brought by Hagon John, guardian of Oscar and Annie Loman, and not by Hagon John as an individual. By a reference to the plea of intervention, which is found on pages 23 and 24 of

the transcript, it will be observed in the prayer of the petition that Hagon John was seeking to have the conveyances in controversy in this suit set aside for the benefit of his wards. The prayer of said petition is as follows:

"The premises considered, your petitioner prays that the leases executed by said Thomas Loman to the defendants, Choctaw, Chickasaw Investment Company, Elmer Williams, Eli Williams, and the deeds executed by the said Thomas Loman to L. A. Hawk, and by L. A. Hawk to E. E. Fuller, and by E. E. Fuller to Lewis Paullin, the plaintiff, be cancelled, set aside, and held for naught, as a cloud upon your petitioner's title, and that such other and further orders be made in the premises as will fully protect the rights of these intervenors."

The language of this petition may not be as explicit as it might be, and the petition itself may not be inartificially drawn, but the sense of the petition is that Hagon John is seeking to set aside conveyances on land which he claims belongs to his ward.

The statute which seems to have been overlooked by the Court is Section 4998 of the General Statutes of Oklahoma, 1908, and reads as follows:

"Executor-Trustee-Plaintiff. An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

The plaintiff in error, Hagon John, proceeded under this section in filing his interplea.

This section of the statute, being section 4226 of Wilson's Digest, was construed by the Supreme Court of Oklahoma, in the case of *McColgan et al.* v. *Territory et al.*, 49 Pac. 1018; and we think that if the court's attention had been called to this decision, the section of the statute above referred to, that it would have reached a different conclusion, as we think under this statute and decision Hagon John had the right to bring the action in the manner that it was brought.

For as much as it appears that this section of the statute and this decision were not called to the court's attention, and were overlooked by the court in preparing its opinion, the plaintiff in error prays for a re-hearing in this cause to the end that the case may be heard on its merits.

Respectfully submitted,

N. R. Maxey,

Attorney for Plaintiff in Error.

Endorsed: No. 202. Hagon John, Gdn., vs. Lewis Paullin et al. Petition for rehearing. No. 202. Hogan John, Guardian, v. Lewis Paullin et al. Petition for rehearing. Filed Sept. 27, 1909. W. H. L. Campbell, Clerk. Overruled.

In the Supreme Court of the State of Oklahoma—United States of America, State of Oklahoma —ss.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and correct copy of the original petition for rehearing of plaintiff in error in the case of Hagon John, Guardian, plaintiff in error, vs. Lewis Paullin, et al., defendants in error, filed September 27th, 1909, as the same remains on file in my office.

In witness whereof, I hereto set my hand and affixed the seal of said Supreme Court, this April 20th, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court.
By REUEL HASKELL, JR.,
Deputy.

In the Supreme Court of the State of Oklahoma—Hagon John, Plaintiff, v. Lewis Paullin et al., Defendants.

To the Hon. Chief Justice and Justices of the Supreme Court of the State of Oklahoma:

We beg your indulgence to submit a few observations and call your attention to some cases that we think have a bearing on the motion for rehearing in this cause.

Since filing our petition for a rehearing, we have examined the case of the *St. Louis & San Francisco Railway Company v. Cundeiff*, recently decided by the United States Circuit Court of Appeals, for the Eighth Circuit, and reported in the advance sheets of the Federal Reporter, of date September 23, 1909, at page 319. In this case the court holds that the procedure of the State of Arkansas governs in all cases brought prior to statehood, and that the pleadings, practice and procedure follows the case to its final determination. If this rule should be followed by this court, then a citation in this case was not necessary to be issued and served on any of the defendants. This case was brought prior to statehood, on the equity side of the docket, and under section 1270 of Mansfield's Digest, the appeal having been taken in open court, no citation was necessary. Section 1270 is as follows:

"Unless the appeal is granted by the inferior court or the appellee enters his appearance in the Supreme Court he shall be summoned actually or constructively as provided by law for the service of summons, to appear and answer the appeal or writ of error."

This practice prevailed in the United States Court of Appeals for the Eighth Circuit, and also in the United States Court of Appeals for the Indian Territory, prior to statehood. The appeal in this case was taken in open court, as will appear by the record.

If, on the other hand, this court should determine that it will not follow the rule laid down in the case from the United States Court of Appeals above cited, then we desire to call the court's attention to the following cases:

Waldrip, Guardian, v. *Talley*, 48 Ark. 297;
Rankin v. *Schofield*, 70 Ark. 83;
Same case, 66 S. W. Rep. 197.

These two cases discuss the status and relation of a guardian and his ward, and we think are applicable to the case at bar.

We also desire to call the court's attention to the following cases from the State of Kansas, construing the section in our petition for rehearing:

Burkett v. *Cogan*, 26 Kans. 109;
Schem v. *Schem*, 61 Kans. 643.

In the case reported in 26 Kans., the opinion was rendered by Justice Brewer, and construes the section of the Kansas Statute which is the same statute as quoted in our petition for rehearing. Under the rule in that case, we very much fear that if this court should adhere to its former opinion that these minors will be forever precluded by the judgment of

the court below, and they certainly should have a day in court, either through their guardian, or within the statutory limitation after they come of age.

We also desire to call the court's attention to the fact that since the filing of the petition for rehearing all of the defendants have entered their appearance, and waived the issuing and service of citation on them, as required by law.

We have called the court's attention to these authorities, as we know it is the desire of the court to reach a conclusion that is correct, and not do these minors an injury that may result fatally to them in the future.

The cases cited by the court in its opinion in this case, have been examined by us, and with all due respect we submit that the cases were under different statutes than our own, and, under our view, our statute is entitled to a different construction than that placed on the Alabama Statute and the New York Statute.

Respectfully submitted,

N. R. Maxey,

Att'y for Hogan John, G'd'n.

Indorsed on the back in letters and figures as follows, to-wit: No. 202. Hagon John, Plaintiff, vs. Lewis Paullin et al., Defendants. Filed Oct. 8, 1909. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma—United States of America, State of Oklahoma —ss.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the annexed and foregoing is a full, true and correct copy of the original Amendment to the Application for Rehearing in the case of Hagon John,

Guardian, Plaintiff in Error, vs. Lewis Paullin, et al., Defendants in Error, No. 202, as the same remains on file in my office.

In witness whereof, I hereto set my hand and affix the seal of said court, this April 20th, 1911.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court.
By REUEL HASKELL, JR., *Deputy.*

APPENDIX 10.

Patent From the United States to the Choctaw Nation.

Record No. 7. Recites: Patent, United States of America to Choctaw Nation.

That the Treaty of Dancing Rabbit Creek, held on September 15, 1830, ratified by the Senate of the United States, February 24th, 1831 (7 Stat. p. 338), by and between the commissioners on the part of the United States, and the Mingoes, Chiefs, Captains and Warriors of the Choctaw Nation, on the part of said Nation, provides as follows by Article II:

The United States, under a grant especially to be made by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country West of the Mississippi River in fee simple to them and to their descendants, to inure to them while they shall exist as a Nation and live on it. Beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States, or, to those limits; thence

due south to Red River, and down Red River to the West boundary of the Territory of Arkansas; thence North along that line to the beginning—the boundary of the same to be agreeable to the Treaty made and concluded at Washington City in the year 1825.

Therefore, in consideration of the premises and in execution of the Agreement and stipulations in the aforesaid Treaty, the United States of America do Give and Grant unto the said Nation the aforesaid "Tract of country West of the Mississippi."

To Have and to Hold the same in fee simple to them and their descendants, to inure to them while they shall exist as a Nation and live on it, liable to no transfer or alienation, except to the United States or with their consent.

Test, I, John Tyler, President of the United States of America, have caused letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, March 23, 1842.

By the President, JOHN TYLER.

DANIEL WEBSTER,
Secretary of State.

JOHN C. SPENCER,
Secretary of War.

T. HARTLEY CRAWFORD,
Com. Indian Affairs.

J. WILLIAMSON,
Recorder Gen. Land Office.

Recorded Vol L, p. 43.

Executed in the Bureau of Topographical Engineers.

JOHN A. ALBERT,
Col. Corps. T., Engineers.

Recorder of
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Office Supreme Court, U. S.
FILED
DEC 5 1913
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 105.

HAGAN JOHN, GUARDIAN OF OSCAR AND ANNIE LOMAN, MINORS, PLAINTIFFS IN ERROR,

VS.

LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT COMPANY, ET AL.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

E. F. COLLADAY,
Attorney for Plaintiffs in Error.

J. D. MILANS & SONS LAW PRINTERS, 707 9TH ST. N. W. WASH. D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 105.

HAGAN JOHN, GUARDIAN OF OSCAR AND ANNIE LOMAN, MINORS, PLAINTIFFS IN ERROR,

VS.

LEWIS PAULLIN, CHOCTAW-CHICKASAW INVESTMENT COMPANY, ET AL.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

The Federal Questions Involved:

The record in this case presents the following Federal questions:

1. The plaintiffs in error were denied, by the Supreme Court of Oklahoma, the right to appeal under the Federal law in force in Indian Territory before statehood,

when the suit was brought, and continued in force after statehood by the Federal statutes and by section 1 of the Schedule to the Constitution of Oklahoma.

2. The plaintiffs in error were denied by the Supreme Court of Oklahoma their right to recognition as plaintiffs, through their guardian in his capacity as a guardian appointed by a Federal Court and suing under a Federal law.

3. The plaintiffs in error were denied by the Supreme Court of Oklahoma the protection of the power of attorney to Charles H. Williams, made, taken, and existing in conformity with Federal law.

4. The plaintiffs in error were denied by the Supreme Court of Oklahoma the right of title to the land in question, which they claimed by reason of the invalidity of the removal of restrictions under a Federal statute and under the Constitution of the United States.

The Federal questions will be taken up in their order as above stated.

1. *Denial of Right of Appeal.*

The Supreme Court of Oklahoma dismissed the appeal in this case on the ground that it was not properly taken under the Oklahoma statutes.

The Oklahoma statutes had no application to the appeal in this case, which was wholly controlled by the Federal laws in force in Indian Territory before statehood, and continued in force thereafter so far as such cases as the one now at bar are concerned.

The Schedule to the Constitution of Oklahoma provides as follows (Sections 1 and 2):

> "Section 1. No existing rights, actions, suits, proceedings, contracts or claims shall be affected by the change in the mode of government, but all shall continue as if no change in the forms of government had taken place.
>
> "Section 2. All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitations or are altered or repealed by law."

This suit was brought March 29, 1907; on October 18, 1907, the appellants filed their petition for leave to intervene; and on November 16, 1907 Oklahoma was admitted into the Union.

The appeal from the trial court to the Supreme Court of Oklahoma was taken in open Court, with all parties present, March 27, 1908. (Record 61, 62.)

The Act of Congress approved March 3, 1905, 33 Stat., 1084, Section 12, was in force in Indian Territory before statehood, as follows:

> "That hereafter all appeals and writs of error shall be taken from the United States Courts in the Indian Territory to the United States Court of Appeals in the Indian Territory, and from the United States Court of Appeals in the Indian Territory to the United States Circuit Court of Appeals for the Eighth Circuit in the same manner as is now provided for in cases taken by appeal

> or writ of error from the Circuit Courts of the United States to the Circuit Court of Appeals of the United States for the Eighth Circuit."

On May 11, 1909, the Circuit Court of Appeals, Eighth Circuit, in a case involving procedure in cases pending before statehood and continuing after statehood, after reviewing the Constitution of Oklahoma and the laws in force in Indian Territory prior to statehood, said:

> "Construing all of these provisions together, we are of opinion that they do not change, and were not intended to change, the method of procedure in cases pending in the courts of Indian Territory and the Territory of Oklahoma, but that the civil cases pending in the Indian Territory should, after statehood, continue under the law in force in the Indian Territory, and under that law no reply was required prior to statehood. We do not think that the provision of the Constitution relied upon by the railroad company so changes the situation as to make a reply necessary."
>
> St. Louis & S. F. R. Co. vs. Cundieff, 171 Fed., 319, 322.

The provision of the Constitution referred to is Section 2 of the Schedule, *supra*

The sufficiency of an appeal in open court was decided by the Supreme Court of the United States in the case of Taylor vs. Leesnitzer, 220 U. S., 99.

Therefore, the appeal was properly taken and the Supreme Court of Oklahoma erred in holding otherwise, and its error deprived the plaintiffs in error of a Federal right.

This question was specifically urged upon the Supreme Court of Oklahoma when that Court had under consideration the petition of plaintiffs in error for a rehearing, and the said decision of the Circuit Court of Appeals, Eighth Circuit, was presented to the Supreme Court of Oklahoma as controlling the right of appeal, but the latter Court persisted in its erroneous position and denied the right of the plaintiffs in error to appeal under a Federal statute. (Record 80 and 86.)

2. *Denial of Recognition of Plaintiffs through Guardian.*

On April 10, 1906, by order of the United States District Court, for Indian Territory, Hagon John was appointed guardian of the person and estate of Oscar Loman and Annie Loman, and ordered by said United States Court to institute, as such guardian, the proper suit to recover property of said minors. (Record 84.)

On the 8th day of January, 1908, by leave of Court, granted upon his petition to intervene filed October 18, 1907, the guardian filed his intervening petition, and set up the claims of said minors to the land in question. (Record 21-23.)

The Supreme Court of Oklahoma held that the minors never became parties to the action because, as that court said "Intervenor filed his plea of intervention in the lower court as guardian of said wards. He stated in his petition that he filed the same as guardian of said minors, but this statement does not make the minors parties to the action." (Record 77.)

The title and opening words of the intervening petition are in the following language:

"In the United States Court for Durant Division of the Central District, Indian Territory, at Durant.

Lewis Paullin, *Plaintiff*,

vs.

Choctaw-Chickasaw Investment Company, et al.,

Defendants,

Comes now, Hagon John, the duly appointed and acting guardian of Oscar Loman and Annie Loman, minors, and by leave of Court first had and obtained, presents this, his petition of intervention in the above-entitled cause and for cause of action against both plaintiff and defendant, says:"

The material part of the prayer of the intervening petition is as follows: (Record 21-22.)

> "The premises considered, your petitioner prays: That the leases, * * * and the deeds, * * * be cancelled, set aside and held for naught, as a cloud on these petitioners' title, and that such other and further orders be made in the premises as will fully protect the rights of these intervenors." (Record 23.)

The Arkansas statutes, in force in Indian Territory, provided as follows:

> "Sec. 1036. An executor, administrator, guardian, trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or the state, or any officer thereof, or any person expressly authorized by the statute to do so, may bring an action without join-

ing with him the person for whose benefit it is prosecuted."

"Sec. 4955. The action of an infant must be brought by his guardian or his next friend. Any person may bring the action of an infant as his next friend; but the court has power to dismiss it, if it is not for the benefit of the infant, or to substitute the guardian of the infant, or another person, as the next friend."

The Supreme Court of the United States, in a case from the Western District of Texas said:

> "If in the state of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian *ad litem* or next friends."
>
> Mexican Central Ry. Co. vs. Eckman, 187 U. S., 429, 434.

The Texas statutes recited in said case are similar to the Arkansas statutes above quoted. In the opinion of the Court the following quotations from decisions of the Texas Court appear:

> "In Roberts vs. Sacra, Guardian, 38 Texas, 580, it was ruled that the guardian for minor heirs might sue in his own name on a promissory note payable to the ancestor of his wards * * *."
>
> "In Houston & Texas Central Railway Co. vs. Bradley, Guardian, 45 Texas, 171, 176, it was held that under a law authorizing suit for death by wrongful act, which provided that actions thereunder should be 'for the sole and exclusive bene-

> fit of the surviving husband, wife, child, or children, and parents of the person whose death shall have been so caused, may be brought by such entitled parties, or any of them,' the suit might properly be brought in his own name by the guardian of the estate of minor children of the person whose death was caused by such act, and the Court said: 'It is not regarded as material whether the suit is brought in the name of the guardian for his ward or in the name of the ward by his guardian * * *.'"

In concluding the opinion, the Supreme Court of the United States said:

> "We are unable to hold that the Circuit Court erred in assuming that this guardian had the legal right to bring the action in his own name. * * *." Id., 435, 436.

As the statutes of Arkansas clearly authorize the bringing of the suit by the guardian, and those statutes were applied to the Indian Territory by a statute of the United States, the refusal of the Supreme Court of Oklahoma to recognize the wards of Hagan John, or Hagon John himself, as parties, was a denial of a Federal right.

3. *Denial of Protection of Power of Attorney.*

The statutes under which this right is claimed are quoted on pages 41 and 42 of our principal brief herein, and the power of attorney is discussed on pages 42-44 of the same brief.

The power of attorney was made, delivered, and at the time of the institution of this suit, it existed, in con-

formity with the statutes of Arkansas made applicable to Indian Territory by a United States statute.

If said power of attorney had been recognized in this case, the deeds on which the alleged title of the defendant in error, Lewis Paullin, is based would have been held void, and the title to the land would have been held to have vested in the minors, Oscar Loman and Annie Loman, upon the death of their father, Thomas Loman, which occurred on or about February 5, 1906. It is the denial of these conclusions which we contend is a denial of a Federal right.

4. *Invalidity of the Removal of Restrictions.*

This matter is discussed on pages 34 to 41 of our principal brief herein, to which reference is hereby made.

The invalidity of the alleged removal of restrictions was alleged in intervening petition, Record 22, 23. The allegations there made were maintained and urged upon the Trial Court and the Supreme Court of Oklahoma throughout the entire proceedings.

Rule 7 of the Supreme Court of Oklahoma, in force when this case was pending in that Court, is as follows:

> "In each civil cause filed in this Court counsel for plaintiff in error, shall, unless otherwise ordered by the Court, serve his brief on counsel for defendant in error within forty days after filing his petition in error, and shall at the same time file fifteen copies of said brief with the Clerk of the Supreme Court. And the defendant in error shall, unless otherwise directed by the Court, have thirty days after service on him of plaintiff in error's brief in which to serve and file his an-

swer briefs. Proof of service of briefs must be filed with the Clerk of this Court within ten days after service. In case of failure to comply with the requirements of this rule, the Court may continue or dismiss the cause, or reverse or affirm the judgment."

Certified copies of the brief in this case, which were filed in the Supreme Court of Oklahoma in compliance with said rule, were filed in the Clerk's office of the Supreme Court of the United States with and as a part of the record in this case, but were omitted from the printed transcript of the record. A material part of the brief of the plaintiffs in error is as follows:

> "The law that attempted to give the Secretary of the Interior power to remove restrictions upon the alienation of lands in the Choctaw and Chickasaw Nations was unconstitutional and void. * * *."

The other material parts of said brief and the material parts of the brief of defendant in error are quoted on pages 22 to 25 of our principal brief herein.

Merits of the Case.

The Power of Attorney.

The power of attorney from Thomas Loman to Charles H. Williams was executed on the 17th day of June, 1905, and immediately thereafter Charles H. Williams took possession of the land and was in possession thereof until dispossessed by the judgment of the trial

court. Said power of attorney is set forth in full on pages 19 and 20 of the record, including the following language:

> "I hereby sell, convey and transfer to said agent and attorney in fact named herein an interest in all the above lands and the rents thereof, and agree that this power of attorney is coupled with interest in said lands and the rents thereof, and I further agree in consideration of the payment mentioned above, that this power of attorney shall not be revoked by me, by heirs, executors or administrators before the first day of January, A. D. 1920."

Charles H. Williams being in possession of the land, the defendant in error, Paullin, took the deeds subject to the rights of said Williams. Paullin, in the agreed statement of facts (Record 16), has admitted said possession.

Actual possession of land is notice to all the world of the possessor's title.

Jones vs. Phelps, 33 Ark., 465.

To the same effect are:

Railway Co. vs. Knott, 54 Ark., 424, and
Whitham vs. Lehmer, 98 Pacific R., 351 (Supreme Court of Oklahoma).

The power of attorney to Williams was coupled with an interest and not revocable.

> A power of attorney, forming a part of a security upon the assignment of a chose in action, is not revocable by the Grantor. For it then

sounds in contract, and is coupled with an interest.

Dartmouth College vs. Woodward, 4 Wheaton, 518, 700.

It is the possession of the legal estate, or a right in the subject over which the power is to be exercised, that makes the interest in question. And when an executor, guardian or other trustee, is invested with the rents and profits of land, for the sale or use of another; it is still an authority coupled with an interest, and survives.

Peter vs. Beverly, 10 Peters, 533.

"It is conceded that, as a general rule, a principal has the right to revoke a power of attorney at any time, whether it is in terms irrevocable or not. But to this general rule there are well-established exceptions as where it is coupled with an interest, or where it is contractual in its nature, given for a consideration and for the protection of some one, or some interest. In our opinion this power falls under this exception to the general rule. It was contractual in its nature; was given upon consideration that defendant should have the right to carry on its business in this State and for the protection 'of those who should deal with the' defendants."

Hunter vs. Mut. Reserve Life Ins. Co., 218 U. S., 590.

In the District of Columbia a power of sale given to more than one person named in a will as executors, coupled with the active and continuing duty of managing the property, making disposition thereof and changing investments for the benefit of the family of testator, is not a mere naked power to sell, but one that creates a

trust which survives and can be executed by the survivor.

Wilson vs. Snow, 228 U. S., 217.

The death of Thomas Loman is not material as between the power of attorney and the deeds, for the reason that the death occurred after the date of the last deed.

The Arkansas statute providing the manner in which such a power of attorney shall be revoked is quoted on page 42 of our principal brief herein, but no attempt was made by Thomas Loman to revoke it.

The remaining question on the merits, namely, the power of the Secretary of the Interior to remove the restrictions upon the alienation of the land, is fully treated in the principal brief filed in behalf of the plaintiffs in error, on pages 34 to 46.

The dates of the earlier proceedings in this cause in the trial court do not appear in the record, but are shown in a transcript from the appearance docket, certified by the Clerk of the District Court for Bryan County, Oklahoma, copy of which is printed as an appendix to this brief.

The facts in this case are all set forth in the agreed statement of facts on pages 15 to 17 of the Record, and it is hoped that this Honorable Court will decide the case upon its merits and determine the rights of the parties.

Respectfully submitted,

E. F. Colladay,
Attorney for Plaintiffs in Error.

APPENDIX.

No. 916.

Lewis Paullin vs. Choctaw-Chickasaw Investment Co.

Crockett & Hayes, Attorneys for Plaintiff.

C. C. Parker, Attorney for non-resident Defendants.

Crook & Kyle, Attorneys for Defendant.

N. B. Maxey, Attorney for Intervenor.

3/29/'07 To filing Complaint.

3/29/'07 Issuing Summons, Filing and Entering Returns.

4/1/'07 Warning Order.

6/7/'07 Amended Complaint.

6/26/'07 Answer of Defendant.

6/5/'07 F & E Demurrer.

7/20/'07 Answer Deft.

10/18/'07 Agreed Statement of Facts.

10/18/'07 Motion for Leave to Intervene.

12/24/'07 Filing Depos.

Dec. 19/'07 Filing Answer by Deft.

Jan. 8/'08 Filing Depositions.

Jan. 8/'08 Filing Petition.

Jan. 11th/'08 Filing Demurrer.

Jan. 13/'08 Filing Motion.

Jan. 13/'08 Filing Motion.

Jan. 13/'08 Filing Motion for New Trial.

3/30/'08 Filing Bonds.

3/30/'08 Filing two copies of Transcript.

6/6/'08 Filing certf. of Appeal Supreme Court.

1/8/'09 Filing certf. Appeal Sup. Court.

6/27/'10 Filing Mandate Supreme Court.

June 30, 1910, Filing Mandate Sup. Ct.

STATE OF OKLAHOMA, } *ss.*
County of Bryan, }

I, W. A. Jones, Clerk of the District Court in and for Bryan County, State of Oklahoma, do hereby certify that the within and foregoing is a full, true and complete copy of the filing entries as the same appears of record in the Civil Fee Book No. 1, U. S. Court, Durant, I. T., in the case of Lewis Paullin vs. Choctaw Chickasaw Investment Co., case No. 916.

And I further certify that the original files in this case are not in this office at this time, nor have I seen said papers within the past four (4) years, having been connected with this office as deputy under the former Clerk, beginning May, 1908, and ending March, 1912.

In testimony whereof I have hereunto subscribed my official signature and affixed the seal of this Court on this the 29th day of November, A. D. 1913.

W. A. JONES,

[SEAL.] *Clerk of the District Court in and for Bryan County, Oklahoma.*

In this case, as nothing was decided but a preliminary question of the jurisdiction of a state appellate court which turned entirely upon a question of local law, the writ of error is dismissed.
Writ of error to review 24 Oklahoma, 636, dismissed.

THE facts, which involve the jurisdiction of this court under § 237 of the Judicial Code to review a judgment of the appellate court of a State dismissing an appeal from an inferior court, are stated in the opinion.

Mr. Edward F. Colladay, with whom *Mr. Napoleon B. Maxey* was on the brief, for plaintiff in error.

Mr. W. T. Sprowls, *Mr. V. B. Hays* and *Mr. Robert Crockett*, for defendants in error, submitted.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

Our jurisdiction in this case is challenged by a motion to dismiss. The case was begun in the United States Court for the Central District of the Indian Territory, and was pending in that court when the Territory of Oklahoma and the Indian Territory were admitted into the Union as the State of Oklahoma. Under the combined operation of the Oklahoma Enabling Act (June 16, 1906, 34 Stat. 267, c. 3335; March 4, 1907, *Id.* 1286, c. 2911) and the state constitution (see *Benner* v. *Porter*, 9 How. 235, 246) the case was then transferred to the district court of Bryan County, where a trial resulted in a judgment determining the matters in controversy, which turned in part upon the validity, under the laws of the United States, of certain deeds and leases executed by an Indian allottee, since deceased. The guardian of two minor heirs of the allottee had intervened in the cause, had asserted the invalidity of all the deeds and leases, and

had set up a claim to the property in question as against the other parties; but this claim was rejected, and the guardian sought to have the judgment reviewed and reversed by the Supreme Court of the State. That court held that some of the parties below, whose presence in the appellate proceeding was essential, had not been brought into that proceeding, or voluntarily appeared therein, in accordance with the law of the State, and upon that ground dismissed the proceeding. 24 Oklahoma, 636. The guardian then sued out the present writ of error.

As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, § 237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.

Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan* v. *Bransford,* 139 U. S. 197; *Brown* v. *Massachusetts,* 144 U. S. 573; *Jacobi* v. *Alabama,* 187 U. S. 133; *Hulbert* v. *Chicago,* 202 U. S. 275, 281; *Newman* v. *Gates,* 204 U. S. 89; *Chesapeake & Ohio Railway Co.* v. *McDonald,* 214 U. S. 191, 195.

But it is said that the proceedings by which it was attempted to secure a review of the judgment of the trial court should have been tested by the act of Congress of

March 3, 1905, 33 Stat. 1048, 1081, c. 1479, § 12, and that the Supreme Court of the State erred in holding otherwise. We cannot accede to the contention. The act of 1905, § 12, related to the review of judgments rendered in the courts temporarily established by Congress in the Indian Territory, and had no application to judgments rendered after statehood in the courts of the State. Besides, the mode of subjecting the judgments of the State's subordinate courts to review in its Supreme Court was a matter of local concern only and not within the control of Congress. See *Coyle* v. *Smith*, 221 U. S. 559.

The state constitution provided (Art. 7, § 8) that the appellate jurisdiction of the Supreme Court should be invoked in the manner prescribed by the laws of the Territory of Oklahoma, until the state legislature should provide otherwise, and also (Art. 25, § 2) that the laws of the Territory of Oklahoma, not repugnant to the state constitution or locally inapplicable, should be extended over the new State, which embraced the Indian Territory as well as the Territory of Oklahoma. When the State was admitted into the Union the Territory of Oklahoma had a full complement of laws regulating appellate proceedings. Wilson's Rev. & Ann. Stat. 1903, §§ 4732 *et seq.* It was by these constitutional provisions and laws that the Supreme Court tested the appellate proceedings in this instance, with the result that they were adjudged inadequate because they had not brought before the court, within the time prescribed (Wilson's Stat., §§ 4736, 4748), parties whose presence was essential to enable it to review the judgment below.

Thus it appears that nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matters shown in the record, and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the constitution and laws of the State. In

short, the judgment of dismissal turned entirely upon a question of local law.

As particularly apposite, we quote the following from the opinion in *Newman* v. *Gates*, *supra*, a case in which this court declined to review a like judgment of dismissal by a state court:

"Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such a question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting."

Writ of error dismissed.